Supreme Court, U.S.
FILED
04 87 JUL 15 2004
OFFICE OF THE CLERK

No. 04-

IN THE

# Supreme Court of the United States

KOYO SEIKO CO., LTD.
AND KOYO CORPORATION OF U.S.A.,
*Petitioners,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit**

## PETITION FOR A WRIT OF CERTIORARI

CARTER G. PHILLIPS*
JOSEPH R. GUERRA
NEIL R. ELLIS
MARINN F. CARLSON
NEIL C. PRATT
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

*Counsel for Petitioners*

* Counsel of Record

July 15, 2004

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

## QUESTIONS PRESENTED

In the decision below, the Federal Circuit deferred, under *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to the Department of Commerce's conclusion that the Tariff Act of 1930, as amended, permits a practice known as "zeroing" when the agency determines the existence and extent of a foreign company's liability for "dumping"—*i.e.*, the selling of goods into the United States at prices lower than those at which it sells the same goods in its home market. The Federal Circuit deferred to this statutory interpretation notwithstanding that (1) the Tariff Act was amended in 1994 to incorporate language from the Uruguay Round Agreements, a multilateral treaty to which the United States is a signatory; (2) Congress adopted these amendments to ensure that the United States complies with its obligations under that multilateral treaty, and (3) the entity empowered to interpret that multilateral treaty has repeatedly ruled that "zeroing" is *not* permitted by the very treaty language that the 1994 amendments incorporated into the Tariff Act. Accordingly, the questions presented are:

Whether the court of appeals erred in according *Chevron* deference to a Department of Commerce interpretation of the Tariff Act that places the United States in violation of its obligations under a multilateral treaty; and

Whether the court of appeals erred by creating a doctrinal conflict with other circuits that have recognized that, when an agency interprets an ambiguous statute, the *Charming Betsy* canon of statutory construction affords the agency discretion to interpret the statute in a manner consistent with the Nation's international legal obligations, but renders unreasonable, for purposes of *Chevron*, an agency interpretation that places the United States in violation of its international legal obligations.

## PARTIES TO THE PROCEEDING

Petitioners are Koyo Seiko Co., Ltd., a Japanese manufacturer of automobile parts and subassemblies, including tapered roller bearings, and its wholly-owned U.S. subsidiary, Koyo Corporation of U.S.A. Petitioners are collectively referred to as "Koyo" in this petition.

Respondent is the United States of America.

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED | i |
| PARTIES TO THE PROCEEDING | ii |
| TABLE OF AUTHORITIES | v |
| OPINIONS BELOW | 1 |
| JURISDICTION | 1 |
| STATUTORY PROVISIONS INVOLVED | 2 |
| STATEMENT OF THE CASE | 2 |
| A. The Statutory Framework | 4 |
| B. The Department's "Zeroing" Practice And Its Incompatibility With The WTO | 7 |
| C. Administrative Proceedings Below | 11 |
| D. Legal Proceedings | 13 |
| REASONS FOR GRANTING THE PETITION | 14 |
| I. THE DECISION BELOW IMPROPERLY UPHELD AN AGENCY INTERPRETATION THAT IMPERMISSIBLY CONFLICTS WITH U.S. TREATY OBLIGATIONS | 15 |
| A. The Department's Interpretation Conflicts With The United States' Treaty Obligations | 15 |
| B. The Conflict Between The Department's Interpretation And The United States' Treaty Obligations Warrants This Court's Review | 16 |

TABLE OF CONTENTS—continued

Page

II. THE DECISION BELOW SOLIDIFIES A SPLIT OF AUTHORITY OVER THE ROLE OF THE *CHARMING BETSY* CANON IN CASES THAT INVOLVE *CHEVRON* REVIEW OF AGENCY INTERPRETATIONS ..... 18

III. THE PROPER ROLE OF THE *CHARMING BETSY* CANON IN CASES INVOLVING *CHEVRON* REVIEW OF AGENCY INTERPRETATIONS IS A RECURRING ISSUE ..... 22

CONCLUSION ..... 25

# TABLE OF AUTHORITIES

CASES

Page

*AK Steel Corp.* v. *United States*, 226 F.3d 1361 (Fed. Cir. 2000) ..... 4

*Ali* v. *Ashcroft*, 346 F.3d 873 (9th Cir. 2003) .. 18, 19, 23

*Bowe Passat Reinigungs- und Waschereitechnik GmbH* v. *United States*, 20 CIT 558, 926 F. Supp. 1138 (1996) ..... 8

*Chevron U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) ..... 2, 13

*George E. Warren Corp.* v. *U.S. EPA*, 159 F.3d 616 (D.C. Cir. 1998), *amended on other grounds by* 164 F.3d 676 (D.C. Cir. 1999) ... 19, 20, 23

*Mississippi Poultry Ass'n* v. *Madigan*, 992 F.2d 1359 (5th Cir.), *amended on other grounds by* 9 F.3d 1113 (5th Cir. 1993) ..... 22, 23

*Mitsubishi Elecs. Am., Inc.* v. *United States*, 18 CIT 167, 848 F. Supp. 193, *aff'd*, 44 F.3d 973 (Fed. Cir. 1994) ..... 11

*Murray* v. *Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804) ..... 2, 13

*Navajo Nation* v. *Department of Health & Human Servs.*, 325 F.3d 1133 (9th Cir. 2003) ..... 2

*Neal* v. *United States*, 516 U.S. 284 (1996) ..... 2

*Suramerica de Aleaciones Laminadas, C.A.* v. *United States*, 966 F.2d 660 (Fed. Cir. 1992) ..... 21

*Timken Co.* v. *United States*, 354 F.3d 1334 (Fed Cir. 2004) ..... 13

*Timken Co.* v. *United States*, 240 F. Supp. 2d 1228 (Ct. Int'l Trade 2002), *aff'd*, 354 F.3d 1334 (Fed. Cir. 2004) ..... 13

*Vimar Seguros y Reaseguros, S.A.* v. *M/V Sky Reefer*, 515 U.S. 528 (1995) ..... 16, 24

TABLE OF AUTHORITIES—continued

STATUTES

Page

Uruguay Round Agreements Act of 1994, Pub. L. No. 103-465, 108 Stat. 4809 ..... 6
8 U.S.C. § 1231(b)(2) ..... 18
19 U.S.C. § 1516a(a)(2) ..... 13
§ 1673 ..... 2, 4
§ 1673a(b)(1) ..... 21
§ 1675(a) ..... 11
§ 1677 ..... 2, 4, 5, 7, 13
§ 1677a ..... 4
§ 1677b ..... 2, 5, 6
§ 3512(d) ..... 7
28 U.S.C. § 1581(c) ..... 13

ADMINISTRATIVE DETERMINATIONS

Preliminary Results of Antidumping Duty Administrative Reviews, 65 Fed. Reg. 66711 (Nov. 7, 2000) ..... 11
Issues and Decision Memorandum for the 1998-1999 Administrative Reviews of Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, from Japan (A-588-604/A-588-054); Final Results of Antidumping Duty Administrative Reviews (Mar. 7, 2001) ..... 12

LEGISLATIVE HISTORY

S. Rep. No. 103-412 (1994) ..... 7
Statement of Administrative Action, in *Message from the President Transmitting the Uruguay Round Trade Agreements*, H.R. Doc. No. 103-316, vol. I (1994) ..... 7, 15

TABLE OF AUTHORITIES—continued

INTERNATIONAL AUTHORITIES

Page

*Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade*, Apr. 15, 1994, Marrakesh Agreement Establishing the WTO, Annex 1A, *reprinted in* H.R. Doc. No. 103-316, vol. I (1994) ..... 5, 6

*Agreement on Subsidies and Countervailing Measures*, *reprinted in* H.R. Doc. No. 103-316, vol. I (1994) ..... 23

*European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS/141/R (circulated Oct. 30, 2000) ..... 9

*European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R (adopted Mar. 1, 2001) ..... 9

*Understanding on Rules and Procedures Governing the Settlement of Disputes*, *reprinted in* H.R. Doc. No. 103-316, vol. I (1994) ..... 9

*United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/R (Apr. 13, 2004) ..... 10

*United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R (Jan. 9, 2004) ..... 9, 10

OTHER AUTHORTIES

Congressional Budget Office, *Economic Analysis of the Continued Dumping and Subsidy Offset Act of 2000* (Mar. 2, 2004) ..... 17

TABLE OF AUTHORITIES—continued

Page

Justice Stephen Breyer, The Supreme Court and the New International Law, Address at the American Society of International Law, 97th Annual Meeting (Apr. 4, 2003), *at* http://www.supremecourtus.gov/publicinfo/speeches/sp_04-04-03.html ..... 24

Justice Sandra Day O'Connor, Remarks at Award Presentation by the Southern Center for International Studies (Oct. 28, 2003), *at* http://southerncenter.org/O'Connor_transcript.pdf..... 24

Jacob Viner, *Dumping: A Problem in International Trade* (August M. Kelley 1966) (1922) .... 4

## PETITION FOR CERTIORARI

Petitioners Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A. ("Koyo") respectfully seek a writ of certiorari to the United States Court of Appeals for the Federal Circuit.

## OPINIONS BELOW

The opinion of the court of appeals is reported at 354 F.3d 1334 (Fed Cir. 2004) (Pet. App. 1a-18a). The order of the court of appeals denying Koyo's petition for rehearing (Pet. App. 50a-51a) is unreported.

The opinion of the United States Court of International Trade is reported at 240 F. Supp. 2d 1228 (Ct. Int'l Trade 2002) (Pet. App. 19a-49a).

The determination of the U.S. Department of Commerce is reported at 66 Fed. Reg. 15078 (Mar. 15, 2001) ("*Final Results*"), and in the accompanying Issues and Decision Memorandum for the 1998-1999 Administrative Reviews of Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, from Japan (A-588-604/A-588-054); Final Results of Antidumping Duty Administrative Reviews (Mar. 7, 2001) (the "*Final Decision Memorandum*") (relevant portions reproduced in Pet. App. 119a-125a).

## JURISDICTION

The judgment of the court of appeals was entered on January 16, 2004. On March 17, 2004, the court of appeals entered an order denying Koyo's timely motion for a rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

Sections 731(1), 771(34), 771(35) and 773 of the Tariff Act of 1930, as amended, 19 U.S.C. §§ 1673(1), 1677(34), 1677(35), 1677b, defining the manner in which dumping margins are to be calculated and antidumping duties to be imposed, are reproduced in Pet. App. 54a-62a.

## STATEMENT OF THE CASE

Although this Court's landmark decision in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council Inc.*, 467 U.S. 837 (1984), resolved many of the thorny and fundamental issues surrounding judicial review of an agency's interpretation of a statute the agency administers, *Chevron* left in its wake a handful of equally complicated interpretive problems. For example, this Court was required to decide in a clash between *stare decisis* and *Chevron*, which doctrine prevailed. The Court held that *stare decisis* overrode deference to the agency's construction of its own statute. *Neal* v. *United States*, 516 U.S. 284 (1996). The courts of appeals have also wrestled with whether *Chevron* deference takes precedence over the so-called *Blackfeet Tribe* presumption, which governs the interpretation of statutes enacted for the benefit of Indian tribes. See *Navajo Nation* v. *Department of Health & Human Servs.*, 325 F.3d 1133, 1136 n.4 (9th Cir. 2003) (en banc) (noting division among lower courts).

This case poses a conceptually similar problem: when a court reviews an agency interpretation of an ambiguous statute that implicates the Nation's international legal obligations, how, if at all, must the *Chevron* analysis accommodate the time-honored maxim that "an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains," *Murray* v. *Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). In recent years, one federal court has concluded that, for purposes of *Chevron*, the *Charming Betsy* canon

necessarily affords an agency the discretion to implement an ambiguous statute in a manner consistent with the Nation's international legal obligations, even when Congress has not included this principle in a list of statutorily specified factors the agency must consider. Another court recognized the correlative principle that this canon renders unreasonable, under *Chevron*, a statutory interpretation that places the United States in violation of such obligations.

In the decision below, however, the Federal Circuit accorded *Chevron* deference to an agency interpretation that places the United States in violation of its obligations under a multilateral treaty. Indeed, even though the agency was interpreting statutory language that was virtually identical to, and expressly enacted by Congress to implement, language in a multilateral treaty, the lower court ratified an interpretation that has been flatly rejected by the international body responsible for interpreting the cognate provisions of the underlying treaty.

The fact that the agency's interpretation squarely conflicts with the definitive interpretation of identical treaty language, and will thereby cause the United States to violate its obligations under that treaty, is itself sufficient reason to review the decision below. But the lower court's failure properly to apply the *Charming Betsy* doctrine creates a fundamental doctrinal conflict among the lower courts concerning the interplay of this doctrine and *Chevron* review of agency interpretations that directly affect our Nation's international obligations and duties. This issue is extremely important not only in the area of trade regulation, which this case involves, but also in a variety of contexts—such as pollution control, importation of animal products, and removal of aliens—where United States compliance with international agreements is governed by domestic statutes that are interpreted and applied by administrative agencies. Accordingly, this case affords the Court an opportunity to

provide guidance and clarification to lower courts that are increasingly confronting this issue.

### A. The Statutory Framework.

"Dumping" involves international price discrimination whereby an exporter sells its merchandise in the country of importation at prices lower than those at which it sells the same goods in its home market.[1] In certain circumstances, the importing country may respond to dumping by imposing "antidumping duties" on the offending imports. In the United States, the antidumping regulatory framework is currently embodied in the Tariff Act of 1930, as amended. The Tariff Act defines "dumping" as "the sale or likely sale of goods at less than fair value," 19 U.S.C. § 1677(34), and provides that, when "foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value," and when those sales are found to cause or threaten to cause "material injury" to an industry in the United States, antidumping duties shall be imposed on imports of that foreign merchandise. *Id.* § 1673.

The Department of Commerce (the "Department") is responsible for enforcing the antidumping law. *Id.* § 1677(1). The Tariff Act directs the Department to determine whether foreign merchandise is being sold in the United States at "less than its fair value." *Id.* § 1673(1). To determine this, the Department must compare the prices at which the merchandise is sold in this country (identified as either the "export price" or "constructed export price"[2]) with the

---

[1] In his seminal work, Jacob Viner has explained that "[t]he one essential characteristic of dumping, I contend, is price-discrimination between purchasers in different national markets." Jacob Viner, *Dumping: A Problem in International Trade* 4 (August M. Kelley 1966) (1922).

[2] These two terms are defined in 19 U.S.C. § 1677a(a), (b); *cf. AK Steel Corp.* v. *United States*, 226 F.3d 1361, 1367-68 (Fed. Cir. 2000)

"normal value" of the subject merchandise, which is typically measured as the price at which the merchandise is sold in the exporter's or manufacturer's home market. *Id.* § 1677b(a).[3] The difference, or "dumping margin," is "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise," *id.* §1677(35)(A). The Department then calculates a "weighted average dumping margin," which is defined as:

> the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer.

*Id.* § 1677(35)(B).

Congress added an important new feature to the process of determining "dumping margins" in 1994, after the United States became a signatory to the *Uruguay Round Agreements* that established the World Trade Organization ("WTO"), including the *Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade*, Marrakesh Agreement Establishing the WTO, Annex 1A (Apr. 15, 1994) ("AD Agreement") (relevant portions of which are reproduced in Pet. App. 126a-128a).[4] Article 2.4 of the AD Agreement provides:

> *[a] fair comparison shall be made between the export price and the normal value.* This comparison shall be made at the same level of trade, normally at the ex-

---

(describing the two categories of U.S. sales). In this case, all of Koyo's U.S. sales fell within the "constructed export price" category.

[3] In certain situations, "normal value" can instead be determined on the basis of the prices of the exporter's sales of comparable merchandise to third countries, or on the basis of "constructed value," which, roughly, is the cost of manufacture of the merchandise, plus selling and administrative expenses and profit. 19 U.S.C. § 1677b(a)(1)(C), (4).

[4] *Reprinted in* H.R. Doc. No. 103-316, vol. I, at 1453-77 (1994).

> factory level, and in respect of sales made at as nearly as possible the same time.

Pet. App. 126a (emphasis added). And Article 2.4.2 provides, in relevant part, that

> *[s]ubject to the provisions governing fair comparison in paragraph 4*, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of *all* comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis.

Pet. App. 127a-128a (emphases added).

To ensure compliance with these requirements, Congress adopted the Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994) ("URAA"). As amended by the URAA, the Tariff Act provides that:

> [i]n determining . . . whether subject merchandise is being, or is likely to be, sold at less than fair value, *a fair comparison shall be made between the export price or constructed export price and normal value*.

19 U.S.C. § 1677b(a) (emphasis added). It further provides that, "[i]n order to achieve a fair comparison with the export price or constructed export price," normal value shall be determined as described in the subsequent subsections of the statute. *Id.*

The statutory "fair comparison" requirement incorporates the virtually identical treaty language and requirement into domestic law. Indeed, the Statement of Administrative Action ("SAA") that Congress and the Executive Branch issued in conjunction with the enactment of the URAA expressly notes that the amendments were "intended to bring U.S. law fully into compliance with U.S. obligations under

[the Uruguay Round] agreements."[5] Moreover, with respect to the statutory provisions at issue in this case, the SAA specifically states that the "requirement of Article 2.4 of the Agreement that a fair comparison be made between the export price or constructed export price and normal value is stated in and implemented by section [1677b]."[6]

### B. The Department's "Zeroing" Practice And Its Incompatibility With The WTO.

In the administrative proceeding that underlies this litigation, the Department employed a practice known as "zeroing" when calculating Koyo's weighted average dumping margins. For many of Koyo's U.S. transactions in the period covered by this annual review, the legally relevant prices were *higher* than their normal value, which means that those transactions generated "negative" dumping margins. The Department's practice, however, has been to assign to a negative margin the value of zero in calculating the "aggregate dumping margins" that, under 19 U.S.C. § 1677(35)(B), comprise the numerator of the fraction used to calculate a party's "weighted average dumping margin."

---

[5] Statement of Administrative Action, in *Message from the President Transmitting the Uruguay Round Trade Agreements*, H.R. Doc. No. 103-316, vol. I, at 669 (1994) (Pet. App. 130a). Congress expressly noted the SAA's significance in interpreting the URAA, in 19 U.S.C. § 3512(d), which states that:

> The statement of administrative action approved by the Congress under section 3511(a) of this title shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application.

[6] Pet. App. 131a. *Accord*, S. Rep. No. 103-412, at 67 (1994) ("[a]mended section [1677b(a)] incorporates the requirement of Article 2.4 of the Antidumping Agreement that *a fair comparison be made* between the export price or constructed export price and the normal value") (emphasis added).

A simple example illustrates the practice of zeroing and its effect. Assume that only two U.S. sales of the subject merchandise occurred during the relevant period, one with a U.S. price, after adjustment, of $600, and the other with a U.S. price of $400. Assume further that the normal value in each case is $500. Thus, the first transaction has a dumping margin of -$100, and the second has a dumping margin of $100. Under the Department's zeroing practice, the -$100 would be converted to zero, and the weighted average dumping margin would be calculated as follows:

$$\frac{0 + \$100}{\$600 + \$400} = 10 \text{ percent}$$

If the full effect of the negative dumping margin transaction were considered, however, the weighted average dumping margin would be:

$$\frac{-\$100 + \$100}{\$600 + \$400} = 0 \text{ percent}$$

It has long been recognized that zeroing creates an inherent statistical bias in favor of inflating dumping margins (or even finding the existence of dumping margins where they would not otherwise exist).

> By zeroing negative margins Commerce will find that some dumping occurred if any U.S. sales were made below the average [normal value]. "This will be true even if the vast majority of sales made by the subject foreign producers in the United States were at prices higher than the average [normal value]."

*Bowe Passat Reinigungs- und Waschereitechnik GmbH* v. *United States*, 20 CIT 558, 570-71, 926 F. Supp. 1138, 1149-50 (1996) (quoting Ronald A. Cass & Stephen J. Narkin, *Antidumping and Countervailing Duty Law: The United States and the GATT, in Down in the Dumps* 200, 205 (Boltuck & Litan eds. 1991)).

Moreover, the practice of zeroing has repeatedly been found to violate the WTO AD Agreement. In the *EC – Bed Linen* dispute, both a dispute settlement panel and the WTO Appellate Body found that the practice, when performed by the European Communities, violated Articles 2.4 and 2.4.2 of the AD Agreement.[7] The Appellate Body stated that:

> a comparison between export price and normal value that does *not* take fully into account the prices of *all* comparable export transactions—such as the practice of "zeroing" in this dispute—is *not* a "fair comparison" between export price and normal value, as required by Article 2.4 and by Article 2.4.2.

Pet App. 112a (¶ 55).

In *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*,[8] the Appellate Body left no doubt that zeroing is incompatible with the principles underlying the AD Agreement:

---

[7] *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/R (circulated Oct. 30, 2000) ("*EC – Bed Linen Panel Report*"); *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R (adopted Mar. 1, 2001) ("*EC – Bed Linen Appellate Body Report*") (excerpts attached hereto as Pet. App. 105a-118a). Under the Uruguay Round Agreements, Member States involved in a dispute regarding the obligations created by the Agreements, including the AD Agreement, must first engage in formal "consultations," and then can request that the dispute be handled by a "panel," which is an ad hoc body consisting of three members. *Understanding on Rules and Procedures Governing the Settlement of Disputes*, *reprinted in* H.R. Doc. No. 103-316, vol. I, at 1654-78 (1994). Appeals from panel decisions are taken to the Appellate Body, a seven-member standing body, three of whom serve in any one case. Only the Dispute Settlement Body, which consists of all the Member States of the WTO, can reject a decision of Appellate Body, and then only by "consensus"—i.e., a unanimous vote.

[8] WT/DS244/AB/R (adopted Jan. 9, 2004) ("*US – Corrosion-Resistant Steel*") (excerpts attached hereto as Pet. App. 98a-104a).

> [w]hen investigating authorities use a zeroing methodology such as that examined in *EC – Bed Linen* to calculate a dumping margin, whether in an original investigation or otherwise, that methodology will tend to inflate the margin calculated. Apart from inflating the margins, such a methodology could, in some instances, turn a negative margin of dumping into a positive margin of dumping. . . . Thus, the inherent bias in a zeroing methodology of this kind may distort not only the magnitude of a dumping margin, but also a finding of the very existence of dumping.[9]

The incompatibility of the Department's zeroing practice with the AD Agreement was recently reaffirmed by the panel decision in the *US – Softwood Lumber* dispute, issued on April 13, 2004.[10] Relying on the Appellate Body's determination in *EC – Bed Linen*, the *US – Softwood Lumber* panel found that the Department's zeroing practice is inconsistent with the AD Agreement, explaining that:

> [t]hrough the use of zeroing, it is clear to us that the entirety of the prices of some export transactions, i.e., those export transactions where the weighted-average-export-price is greater than the weighted-average-normal-value, . . . are not taken into account. . . .
>
> . . . [W]e are of the view that the United States did not take into account all comparable export transactions when DOC calculated the overall margin of dumping in the investigation at issue.

Pet. App. 77a-78a (¶¶ 7.216, 7.217).

---

[9] Pet. App. 102a-103a (¶ 135). In the *US – Corrosion-Resistant Steel* dispute, although the Appellate Body emphasized the governing principles, it concluded that it could not resolve the particular issue due to inadequacies in the record before it. *Id.* at 103-104a (¶ 137 ).

[10] *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/R (Apr. 13, 2004) (footnote omitted) ("*US – Softwood Lumber*") (excerpts attached hereto as Pet. App. 63a-97a).

### C. Administrative Proceedings Below.

This case arises from the annual review for tapered roller bearings from Japan for the 12-month period October 1, 1998 to September 30, 1999.[11] The statute provides that, in each annual review, the Department must issue both a preliminary and final determination. 19 U.S.C. § 1675(a)(3)(A). In this case, the Department issued its preliminary determination on November 7, 2000, in which it used the "zeroing" practice to calculate Koyo's weighted average dumping margins at 14.86% and 17.94% for the two categories of tapered roller bearings that are subject to the antidumping orders.[12] If the Department had not "zeroed" Koyo's negative margin transactions, Koyo's average dumping margins would have been reduced to zero percent for the first category and under 5% for the second. Thus, by zeroing, the Department created antidumping liability where none otherwise would have existed (for the first category) or substantially inflated that liability (for the second).

After the Department issued the *Preliminary Results*, Koyo informed the Department that the practice of zeroing had been declared inconsistent with the AD Agreement in the *EC – Bed*

---

[11] The statute provides that every year, on the anniversary month of an antidumping order, any interested party may request a "periodic" or "annual" review in which the Department is to "review, and determine . . . the amount of [the] antidumping duty." 19 U.S.C. § 1675(a)(1)(B). The results of the annual review determine the exporter's final antidumping duty liability for the entries of merchandise into the United States during the 12-month period governed by the review, and establish an estimated duty rate that is to apply to subsequent entries of the merchandise, until the next requested annual review. *See, e.g., Mitsubishi Elecs. Am., Inc.* v. *United States*, 18 CIT 167, 174, 848 F. Supp. 193, 199, *aff'd*, 44 F.3d 973 (Fed. Cir. 1994).

[12] *Preliminary Results of Antidumping Duty Administrative Reviews*, 65 Fed. Reg. 66711, 66716 (Nov. 7, 2000) ("*Preliminary Results*").

*Linen Panel Report*.[13] Accordingly, Koyo argued that the Department should not have zeroed the dumping margins of the negative-margin transactions in calculating Koyo's weighted average dumping margins. In its *Final Results*, the Department rejected that argument and again applied its zeroing practice in calculating Koyo's weighted average dumping margins.[14] In the *Final Decision Memorandum* that accompanied the *Final Results*, the Department explained its reasons for rejecting Koyo's argument:

> [t]hese antidumping administrative reviews are being conducted under the domestic laws of the United States, which laws are fully consistent with international obligations. We note that the calculation methodology addressed by respondents has been upheld repeatedly as consistent with domestic law by reviewing domestic courts. . . . Consequently, the WTO dispute resolution panel reports referred to by respondents, which addressed a matter of WTO jurisprudence, and not domestic U.S. law, is not relevant to this determination. We do note in passing, however, that the report in question addressed EC law and practice and was not a challenge to U.S. law.

Pet. App. 125a (citations omitted). This is the entire basis of the Department's decision on the zeroing issue.

---

[13] The WTO Appellate Body subsequently issued its decision affirming the panel report on the zeroing issue on March 1, 2001, *i.e.*, after Koyo filed its case brief with the Department, but before the Department issued its *Final Results*.

[14] The Department issues, with its final results in antidumping proceedings, an unpublished memorandum that explains its decisions on issues raised by the parties. In this case, the Department's discussion of the zeroing issue is found in its *Final Decision Memorandum* (excerpts attached at Pet. App. 119a-125a).

**D. Legal Proceedings.**

Koyo sought review of the Department's determination in the U.S. Court of International Trade, which has exclusive jurisdiction to hear appeals from decisions of the Department in antidumping annual reviews. 19 U.S.C. § 1516a(a)(2)(A), (B)(iii); 28 U.S.C. § 1581(c). The Court of International Trade upheld the Department's decision in *Timken Co.* v. *United States*, 240 F. Supp. 2d 1228 (Ct. Int'l Trade 2002) (Pet. App. 19a-49a), and the Federal Circuit affirmed that disposition. 354 F.3d 1334 (Fed Cir. 2004) (Pet. App. 1a-18a).

In reviewing the zeroing issue, the Federal Circuit followed *Chevron*'s familiar two-part framework for determining the propriety of an agency's interpretation of a statute it administers. It thus considered whether Congress had spoken directly to the issue through plain and unambiguous statutory language and, if not, whether the Department's interpretation was reasonable. See *Chevron*, 467 U.S. at 842-43. With respect to *Chevron*'s first prong, the Federal Circuit held that the zeroing practice was not compelled by the language of the Tariff Act. The court reasoned that the word "exceeds" in the statutory definition of "dumping," 19 U.S.C. § 1677(35)(A), "does not unambiguously require that dumping margins be positive numbers." Pet. App. 9a.

With respect to *Chevron*'s second prong, the court concluded that the practice of zeroing was "a reasonable interpretation of the statutory language." Pet. App. 10a. The Federal Circuit offered three reasons for rejecting Koyo's argument that zeroing could not be "reasonable" because such an interpretation causes the United States to violate its obligations under the WTO AD Agreement, and thus runs afoul of the settled rule that "an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains." *Charming Betsy*, 6 U.S. (2 Cranch) at 118.

First, the court below opined that the statute specifies how the Department is to calculate the "normal value" that is used in making the required "fair comparison," and that the statute's "exhaustive" list of adjustments effectively precludes creation of any "additional limitations on the calculation of dumping margins." Pet. App. 13a. Second, the court refused to apply the *Charming Betsy* canon on the ground that the *EC – Bed Linen* decision "is not binding on the United States, much less this court," and is insufficiently persuasive to overcome the Department's "longstanding and consistent administrative interpretation." *Id.* at 14a (internal quotation marks omitted). Finally, the court sought to distinguish the *EC – Bed Linen* decision because (1) the former involved the EC, rather than the United States, and (2) the former involved an antidumping investigation rather than an annual review. *Id.* at 14a-15a.

The Federal Circuit denied Koyo's petition for rehearing without opinion. Pet. App. 50a-51a. On April 22, however, it granted Koyo's motion for a recall and stay of the mandate pending the outcome of Koyo's petition to this Court for a writ of certiorari. *Id.* at 52a-53a.

## REASONS FOR GRANTING THE PETITION

Through an incorrect application of *Chevron* deference, the lower court affirmed an administrative interpretation that creates a direct conflict between the WTO Appellate Body's interpretation of the "fair comparison" language of the AD Agreement and the very same language in a statute that Congress enacted to ensure that the United States complies with that Agreement. Such a conflict, which places the United States in violation of its multilateral treaty obligations, warrants review by this Court. This is precisely the type of conflict, moreover, that the *Charming Betsy* canon of statutory interpretation is intended to avoid. Accordingly, this Court should grant the petition in order to clarify the interplay of that canon and *Chevron* review of agency interpretations of

statutes that directly affect our international obligations. This important issue has arisen with increasing frequency in the lower courts, and the decision below conflicts with the approaches that other circuits have adopted in a number of contexts where the United States' compliance with international agreements is governed by domestic statutes that are interpreted and applied by administrative agencies. The Court therefore should grant the petition to resolve this conflict and afford much-needed guidance to the lower courts.

## I. THE DECISION BELOW IMPROPERLY UPHELD AN AGENCY INTERPRETATION THAT IMPERMISSIBLY CONFLICTS WITH U.S. TREATY OBLIGATIONS.

### A. The Department's Interpretation Conflicts With The United States' Treaty Obligations.

The conflict between the Department's zeroing practice and the United States' obligations under the AD Agreement is clear. The United States indisputably bound itself, under that multilateral Agreement, to make a "fair comparison . . . between the export price and normal value" of imported goods when determining antidumping liabilities and duties. Pet. App. 126a (art. 2.4). The international body charged with interpreting the AD Agreement has repeatedly determined that zeroing negative dumping margins does *not* result in the "fair comparison" that the treaty requires. See *supra* pp. 9-10. Yet the Department has adhered to its practice of zeroing such margins. It has done so, moreover, when implementing a statute that incorporated the treaty's "fair comparison" requirement expressly "to bring U.S. law fully into compliance with U.S. obligations under [that] agreement[]." SAA at 669, Pet. App. 130a.

The lower court attempted to brush aside this clear conflict between the agency's actions and U.S. treaty obligations on the ground that the *EC – Bed Linen* decision involved an EC investigation and thus did not bind the United States. As

Koyo pointed out in its petition for rehearing, however, the rationale of the *EC – Bed Linen* decision was recently extended by a WTO panel to the very practice at issue in this case in *US – Softwood Lumber*. Moreover, the Appellate Body has reiterated the same anti-zeroing principles in *US – Corrosion-Resistant Steel*, another recent case involving the United States. See *supra* pp. 9-10. In the face of these repeated rulings, the conflict between the Department's practices and the treaty's requirements is simply beyond dispute.

### B. The Conflict Between The Department's Interpretation And The United States' Treaty Obligations Warrants This Court's Review.

The clear conflict between the Department's interpretation of the Tariff Act and the Nation's treaty obligations warrants plenary review and reversal of the decision below. This Court has emphasized that, "[i]f the United States is to be able to gain the benefits of international accords and have a role as a trusted partner in multilateral endeavors, its courts should be most cautious before interpreting its domestic legislation in such manner as to violate international agreements." *Vimar Seguros y Reaseguros, S.A.* v. *M/V Sky Reefer*, 515 U.S. 528, 539 (1995). By failing to exercise such caution here, the lower court upheld an agency interpretation that not only undermines the Nation's "role as a trusted partner in multilateral endeavors," but also exposes the Nation to international sanctions.

The *Charming Betsy* rule is designed to avoid precisely these types of international legal violations and untoward results. Although the court below gave lip service to that rule, see Pet. App. 13a (noting that "trade laws are not exempt from the *Charming Betsy* principle"), it failed to recognize how the rule affects *Chevron* review of agency interpretations that implicate U.S. international obligations. By requiring that statutes be construed, where possible, to avoid violations of "the law of nations" (*i.e.*, U.S. international obligations),

the *Charming Betsy* rule necessarily excludes from the range of otherwise reasonable interpretations those that violate an international obligation of the United States. This principle should have applied with particular force in this case, where the Department was implementing an ambiguous statute that closely tracked the language of a treaty, and that was expressly adopted to ensure compliance with that treaty. Yet the Federal Circuit upheld as reasonable the agency's implementing practice that has repeatedly been found to violate that very treaty.

This Court should not allow the lower court's affirmation of this misguided interpretation of the Tariff Act to stand. Because antidumping determinations can only be reviewed by the Court of International Trade and the Federal Circuit, no other courts of appeal can weigh in on the issue or correct the agency's erroneous interpretation. And, petitioner's attempt to obtain a rehearing proved fruitless even in the face of subsequent WTO rulings that completely undermined the panel's facile distinctions of the *EC – Bed Linen* decision and that confirmed the inescapable conflict between U.S. law, as interpreted by the Department, and U.S. treaty obligations.

The agency below contravened Congress's clear intent to ensure that U.S. trade laws comply with the Nation's obligations under multilateral trade agreements, and the lower court, in turn, failed to apply the principles this Court has announced to ensure that the United States violates such agreements only when Congress clearly intends that result. The economic significance of the resulting treaty violations is enormous. Koyo estimates that, in 2003 alone, the Department used its treaty-violating zeroing practice in 75 antidumping investigations and annual reviews involving over 200 companies from at least 20 countries around the world. The Congressional Budget Office estimates that, in the years 2005-2009, the United States will collect $2.35 billion in dumping and countervailing duties, and $3.85 billion for the period 2005-2014. Congressional Budget Office, *Economic*

*Analysis of the Continued Dumping and Subsidy Offset Act of 2000* tbl.1 (Mar. 2, 2004). This Court should grant the petition in order to ensure that the Tariff Act is administered in a manner consistent with the requirements of the Uruguay Round Agreements, as Congress intended.

## II. THE DECISION BELOW SOLIDIFIES A SPLIT OF AUTHORITY OVER THE ROLE OF THE *CHARMING BETSY* CANON IN CASES THAT INVOLVE *CHEVRON* REVIEW OF AGENCY INTERPRETATIONS.

The decision below not only creates an unnecessary conflict with U.S. treaty obligations, but it also creates a conflict among the circuits. In contrast to the court below, the Ninth and D.C. Circuits have applied the *Charming Betsy* canon in cases involving review of agency interpretations under *Chevron*'s second prong in a manner that ensures that agency interpretations of statutes do not conflict with the Nation's international legal obligations. Because it can ultimately affect the United States' compliance with a variety of international legal duties, this doctrinal conflict is an exceptionally important one warranting this Court's review.

In stark contrast to the Federal Circuit, the Ninth Circuit recently relied on the *Charming Betsy* canon to reject an agency's interpretation of an ambiguous statute because that interpretation created a conflict with U.S. international obligations. In *Ali* v. *Ashcroft*, 346 F.3d 873 (9th Cir. 2003), the Ninth Circuit ruled that the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), 8 U.S.C. § 1231(b)(2), does not authorize the removal of aliens to a country that does not have a government that can "accept" them. After concluding that the language of IIRIRA does not expressly authorize such removals, the Ninth Circuit declined to defer to the government's construction of the statute. Citing the *Charming Betsy* rule, the Ninth Circuit noted that the government did not contest that removal of the petitioning aliens to Somalia would subject them to human rights abuses

"in violation of 'customary international law and provisions of three multilateral treaties to which the United States is a signatory.'" 346 F.3d at 885 (quoting lower court finding). The Ninth Circuit rejected the government's interpretation of the statute that would have permitted such removal, and instead adopted "the construction of the statute that is consistent with international law." *Id.*

The Ninth Circuit thus employed the *Charming Betsy* rule to limit the range of interpretations that can be deemed reasonable, and therefore entitled to deference, under *Chevron*. By doing so, it refused to defer to an agency interpretation that would have placed the United States in violation of its obligations under international law. In the decision below, the Federal Circuit adopted a directly contrary approach: it rejected the argument that the *Charming Betsy* rule can render an agency's interpretation unreasonable under the second prong of the *Chevron* analysis, and it deferred to an agency interpretation that places the United States in violation of its treaty obligations.

The decision below also conflicts with the D.C. Circuit's recognition that the *Charming Betsy* rule makes it reasonable, under *Chevron*, for an agency to consider U.S. compliance with international legal obligations when interpreting a statute even if the statute itself does not identify such compliance as a factor the agency should consider. In *George E. Warren Corp.* v. *U.S. EPA*, 159 F.3d 616, 623-24 (D.C. Cir. 1998), *amended on other grounds by* 164 F.3d 676 (D.C. Cir. 1999), the petitioners argued that a statute's specification of factors the EPA was to consider in promulgating an air quality rule barred the EPA from considering any other factors, including a decision of the WTO Appellate Body that had concluded that EPA's prior air quality rule violated the GATT. The D.C. Circuit disagreed, holding that, under the second prong of *Chevron*, the agency's conclusion that the statute permitted such consideration was permissible. *Id.* at 624. The Court found that the EPA's consideration of factors not enumerated

in the statute, including the WTO Appellate Body decision, was "congruent with . . . the Supreme Court's instruction to avoid an interpretation that would put a law of the United States into conflict with a treaty obligation of the United States." *Id.* (citing *Charming Betsy*). The D.C. Circuit thus recognized that, where Congress has not unambiguously spoken to the precise issue, the *Charming Betsy* rule affords agencies discretion to adopt an interpretation of an ambiguous statute that ensures that the United States does not violate its obligations under international law, and that reviewing courts must defer to such an interpretation as reasonable.

In the decision below, however, the Federal Circuit adopted a directly contrary approach. It viewed the assignment of a value other than zero to negative dumping margins as an adjustment to "normal value," and reasoned that the statute's "exhaustive" list of the adjustments to be applied in calculating "normal value" effectively precludes the creation of any "additional limitations on the calculation of dumping margins." Pet. App. 13a. The result of the Federal Circuit's logic is that the statute's "exhaustive" specification of factors to be considered deprived the Department of discretion to interpret the statute in a manner that does not violate U.S. treaty obligations.[15] It failed to recognize, as the D.C. Circuit has, that a statutory specification of factors an agency must consider cannot, without more, be understood to prevent an agency from ensuring that implementation of that law does

---

[15] In fact, the Federal Circuit's logic fails even on its own terms. A decision to zero—or not to zero—negative dumping margins occurs after both "normal value" and the "export price" (or "constructed export price") are determined. Thus, a decision not to zero negative dumping margins does not involve an additional, unspecified adjustment to the statutory calculation of "normal value" at all; instead, it is a decision about how to treat a subset of the dumping margins that result after normal value is established. Moreover, even if the practice of zeroing negative dumping margins could be thought of as a further adjustment to "normal value," the lower court's *expressio unius* theory should have led it to reject that practice, because it is nowhere mentioned in the statute.

not place the United States in violation of its treaty obligations. Because the Federal Circuit's approach inescapably *increases* the likelihood of such violations—both by deferring to interpretations that create such violations and by denying agencies discretion to avoid them—this Court should address this important conflict concerning review of agency interpretations that implicate U.S. international legal obligations.

Finally, it is important to emphasize that the decision below is not an isolated aberration in Federal Circuit caselaw. Both of the errors that infected the decision below are evident in the lower court's prior decision in *Suramerica de Aleaciones Laminadas, C.A.* v. *United States*, 966 F.2d 660 (Fed. Cir. 1992), a case that involved the requirement that any petition that seeks an investigation into the "dumping" of imports be filed "on behalf of an industry." 19 U.S.C. § 1673a(b)(1). After determining that the meaning of this phrase was unclear, the Federal Circuit concluded that the Department was at liberty to adopt an interpretation that conflicted with the GATT. 966 F.2d at 667-68. As it did in the decision below, the Federal Circuit in *Suramerica* failed to recognize that, under the *Charming Betsy* canon, such an interpretation cannot be deemed reasonable.

At the same time, the *Suramerica* decision reflects the Federal Circuit's incongruous view that, even when an agency implements an ambiguous statute—and thus enjoys substantial discretion under *Chevron*—the agency lacks discretion to adopt an interpretation that avoids a violation of U.S. treaty obligations. After acknowledging that Congress intended the statute at issue in *Suramerica* to comply with the GATT, the Federal Circuit stated that "we are bound not by what we think Congress should or perhaps wanted to do, but by what Congress in fact did"; "if the statutory provisions at issue here are inconsistent with the GATT, it is a matter for Congress and not this court to decide and remedy." *Id.* But where, as in *Suramerica* and in this case, statutory provisions

are unclear, there is no basis for concluding that they *require* action inconsistent with the U.S. treaty obligations. The very fact of the statutory ambiguity means that the statutory provisions at issue need not be "inconsistent" with any treaty obligation. The ambiguity empowers the administering agency to interpret such provisions in a manner that is consistent with U.S. international legal obligations, and the *Charming Betsy* rule obligates it, where possible, to do so.[16]

In short, the decision below solidifies a clear conflict among the circuits on an important doctrinal issue that ultimately affects the United States' compliance with its international legal obligations.

## III. THE PROPER ROLE OF THE *CHARMING BETSY* CANON IN CASES INVOLVING *CHEVRON* REVIEW OF AGENCY INTERPRETATIONS IS A RECURRING ISSUE.

The doctrinal conflict over the proper application of the *Charming Betsy* canon in cases involving *Chevron* review of agency interpretations is both important and recurring. Not only does the issue have great economic significance in the antidumping arena, but it also arises under a number of other statutes involving such disparate areas as the treatment of

---

[16] The Fifth Circuit later relied on *Suramerica* to hold that, in promulgating a regulation governing poultry imports, the Department of Agriculture lacked discretion to ensure that U.S. domestic law did not contravene U.S. obligations under the GATT. *Mississippi Poultry Ass'n* v. *Madigan*, 992 F.2d 1359 (5th Cir.), *amended on other grounds by* 9 F.3d 1113 (5th Cir. 1993). Quoting the same language set forth in the text above, the Fifth Circuit concluded that the Federal Circuit's "flawless reasoning . . . mandates that we give effect to Congress' intent, even if implementation of that intent is virtually certain to create a violation of the GATT." *Id.* at 1366. Because it involved step one of the *Chevron* analysis, *Madigan* does not directly conflict with the decisions of the Ninth and D.C. Circuits discussed above. Nevertheless, *Madigan* underscores the need for clarification concerning the interplay of the *Charming Betsy* canon and *Chevron* review generally, as well as the potential influence of the Federal Circuit's erroneous decision below.

aliens and transnational pollution control. As global interdependence grows, courts will increasingly grapple with review of agency interpretations that implicate the United States' international obligations in these and other important areas. Accordingly, this Court should the grant the petition to provide much needed guidance on this important and recurring issue of federal law.

As noted above, the proper role of the *Charming Betsy* rule in *Chevron* analysis has great economic significance in the antidumping arena, both because the Department applies its treaty-violating zeroing practice in every one of the large number of antidumping investigations and annual reviews it conducts each year, and because of the significant amount of antidumping duties collected—which, to the best of Koyo's reckoning, are substantially inflated by that practice. The issue also arises in the interpretation of other trade regulatory statutes as well. For example, the domestic countervailing duty law is also governed by one of the Uruguay Round Agreements.[17] Administrative enforcement and implementation of that law inevitably implicate the United States' compliance with the Agreement, and federal courts have repeatedly been called upon to evaluate the propriety, under *Chevron*, of these implementation decisions.

Nor is international trade the only area in which courts must address this issue. The interplay of the *Charming Betsy* rule and *Chevron* analysis has already arisen in connection with statutes governing the removal of aliens from the United States, *Ali*, 346 F.3d at 885, the importation of poultry products into this country, *Madigan*, 992 F.2d at 1366, and the promulgation of regulations governing the air quality in the United States, *George E. Warren Corp.*, 159 F.3d at 624. This list, moreover, is by no means an exhaustive one. As Justice Breyer recently noted:

---

[17] *Agreement on Subsidies and Countervailing Measures, reprinted in* H.R. Doc. No. 103-316, vol. I, at 1533-76 (1994).

> we face an increasing number of domestic legal questions that directly implicate foreign or international law. . . . The growing number of such statutes [*i.e.*, for which reference to foreign legal sources is an appropriate source of interpretive guidance] reflects the commercial, technological, and political changes that we often use the cliché "globalization" to describe.[18]

And, as Justice O'Connor has explained, "[w]e operate today under a large array of international agreements and organizations directly impacting judicial decisionmaking, including . . . the World Trade Organization."[19]

Indeed, the increasing recognition that many complex problems require transnational regulatory solutions has led the United States in recent years to sign on to a number of international agreements, and to enact implementing legislation that is interpreted and enforced by administrative agencies. Given the burgeoning number of such laws and the importance of ensuring that the United States is able to "gain the benefits of international accords and have a role as a trusted partner in multilateral endeavors," *Vimar*, 515 U.S. at 539, this Court should grant the petition, resolve the circuit split, and provide the lower courts with the guidance they need to address this recurring and fundamental issue of administrative law.

---

[18] Justice Stephen Breyer, The Supreme Court and the New International Law, Address at the American Society of International Law, 97th Annual Meeting (Apr. 4, 2003), *at* http://www.supremecourtus.gov/publicinfo/speeches/sp_04-04-03.html.

[19] Justice Sandra Day O'Connor, Remarks at Award Presentation by the Southern Center for International Studies 1 (Oct. 28, 2003), *at* http://www.southerncenter.org/OConnor_transcript.pdf .

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

CARTER G. PHILLIPS*
JOSEPH R. GUERRA
NEIL R. ELLIS
MARINN F. CARLSON
NEIL C. PRATT
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

*Counsel for Petitioners*

* Counsel of Record

July 15, 2004

**APPENDIX A**

UNITED STATES COURT OF APPEALS
FEDERAL CIRCUIT

---

Nos. 03-1098, 03-1238

---

THE TIMKEN COMPANY,
*Plaintiff-Cross Appellant*,

v.

UNITED STATES,
*Defendant-Appellee*,

v.

KOYO SEIKO CO., LTD. and
KOYO CORPORATION OF U.S.A.,
*Defendants-Appellants*,

and

NTN BEARING CORPORATION OF AMERICA, AMERICAN NTN BEARING MANUFACTURING CORPORATION, NTN BOWER CORPORATION, NTN CORPORATION, NSK LTD., and NSK CORPORATION,

*Defendants*.

---

DECIDED: Jan. 16, 2004
Rehearing Denied March 17, 2004

---

Before NEWMAN, BRYSON, and PROST, Circuit Judges.

PROST, Circuit Judge.

Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A. (collectively, "Koyo") appeal the decision of the United States Court of International Trade in *Timken Co. v. United*

*States*, 240 F.Supp.2d 1228 (CIT 2002), holding that the United States Department of Commerce ("Commerce") properly "zeroed" any negative dumping margins in calculating the weighted-average dumping margin applied to imports of Koyo's tapered roller bearings ("TRBs") from Japan. The Timken Company ("Timken") cross appeals arguing that Commerce, in calculating Koyo's constructed export price ("CEP"), improperly applied the adverse-facts-available rate to the entered value rather than the sales value of Koyo's TRBs. Because we agree with the Court of International Trade that Commerce properly resolved both issues, we affirm.

I

Commerce issues antidumping duty orders for imported merchandise that is sold in the United States below its fair value and materially injures or threatens to injure a domestic industry. *See* 19 U.S.C. § 1673e (2000); 19 U.S.C. § 1673d. Specifically, Commerce determines the antidumping duties by first calculating the "dumping margin," which is "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." *Id.* § 1677(35)(A); *see also Koyo Seiko Co. v. United States*, 258 F.3d 1340, 1342 (Fed.Cir.2001). Commerce uses a CEP if, "before or after the time of importation, the first sale to an unaffiliated person is made by (or for the account of) the producer or exporter or by a seller in the United States who is affiliated with the producer or exporter." *Uruguay Round Agreements Act, Statement of Administrative Action*, H.R. Doc. No. 103-826, at 822 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040 ("*SAA*").[1] Various adjustments may be

[1] The SAA is "an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application." 19 U.S.C. § 3512(d).

made to CEP, including reduction by "the cost of any further manufacture or assembly" in the United States. *See* 19 U.S.C. § 1677a(d)(2).

After calculating the dumping margins on the individual U.S. transactions subject to review, Commerce calculates the weighted-average dumping margin "by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate . . . constructed export prices of such exporter or producer." *Id.* § 1677(35)(B); *see also Koyo Seiko*, 258 F.3d at 1342-43. When calculating the weighted-average dumping margin, Commerce treats transactions that generate "negative" dumping margins (i.e., a dumping margin with a value less than zero) as if they were zero. *See, e.g., Serampore Indus. Pvt. Ltd. v. Dep't of Commerce*, 675 F.Supp. 1354, 1360-61 (Ct. Int'l Trade 1987). This practice is referred to as "zeroing." Finally, Commerce uses this weighted-average dumping margin to calculate the duties owed on an entry-by-entry basis. 19 U.S.C. § 1675(a)(2).

In this case Commerce initiated an administrative review of alleged sales of TRBs from Japan at less than fair value during the period of October 1, 1998, through September 30, 1999. *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 64 Fed. Reg. 67,846 (Dec. 3, 1999). Based on its review, Commerce calculated preliminary dumping margins of 17.94% on TRBs greater than four inches in diameter and 14.86% on TRBs less than four inches in diameter. *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, From Japan; Preliminary Results of Antidumping Duty Administrative Reviews*, 65 Fed. Reg. 66,711 (Nov. 7, 2000) ("*Preliminary Results*"). Koyo exported both types of merchandise and thus became potentially liable for antidumping duties. *Id.* Both Koyo and Timken subsequently filed case and rebuttal briefs, with Koyo ques-

tioning, *inter alia*, Commerce's zeroing practice, and Timken questioning, *inter alia*, Commerce's application of the adverse-facts-available rate to the entered value rather than sales value of Koyo's TRBs.

Commerce provided a response in *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, from Japan*, 66 Fed. Reg. 15,078 (Dep't Commerce Mar. 15, 2001) ("*Final Results*") and the accompanying *Issues and Decision Memorandum*, P.R. Doc. No. 141 (Mar. 7, 2001) ("*Decision Mem.*"). With respect to Koyo's challenge, Commerce noted that it properly calculated the weighted-average dumping margin by "zeroing" all negative-dumping-margin transactions. Commerce explained that its calculation methodology was derived from the explicit statutory language, and consistent with international obligations. *See Decision Mem.*, cmt. 1, at 8. Consequently, it finalized Koyo's company-specific, weighted-average dumping margins. *Final Results*, 66 Fed. Reg. at 15,079. With respect to Timken's challenge to the application of the adverse inference to the entered value, Commerce found that Timken's suggested approach would be unduly punitive. *Decision Mem.* at 8. Thus, Commerce continued to apply the adverse inference to the entered value rather than the sales value of Koyo's TRBs.[2] *Id.*

---

[2] Based on existing information, Commerce, at an earlier stage in this proceeding, determined that the value added to Koyo's TRBs substantially exceeded the value of the subject merchandise. It also concluded that the methods for calculating CEP provided in § 1677a(e) would result in an unreliable surrogate value. *Decision Mem.* at 5-6. Accordingly, Commerce exercised its discretion to employ "any other reasonable basis" to calculate the margins for further-manufactured merchandise. *Id.* at 6. It chose to apply its standard methodology, as outlined in § 1677a(d)(2), and required Koyo to file a Section E questionnaire response detailing sales and cost information for its further-manufactured TRBs. *Id.* at 6-7. Koyo refused to comply, however, because it believed it qualified for appli-

The Court of International Trade's review of Commerce's *Final Results* dealt with, *inter alia:* (1) Koyo's arguments that Commerce improperly "zeroed" negative dumping margins when calculating Koyo's weighted-average dumping margins, and (2) Timken's arguments that Commerce should have applied the adverse-facts-available rate to the sales value of Koyo's TRBs. *See Timken*, 240 F.Supp.2d at 1228. As to the first issue, Koyo primarily argued that Commerce's statutory interpretation was unreasonable in light of the World Trade Organization ("WTO") Appellate Body's interpretation of the Antidumping Duty Agreement ("ADA") in *European Communities—Antidumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS/141/AB/R (Mar. 1, 2001) ("*EC—Bed Linen*"). *Timken*, 240 F.Supp.2d at 1242. Rejecting the government's threshold argument that § 3512(c) barred Koyo's appeal, the Court of International Trade went on to note that it had previously affirmed zeroing as a reasonable interpretation of 19 U.S.C. § 1673. *Id.* at 1243 (citing *Serampore Indus.*, 675 F.Supp. at 1360-61 (Ct. Int'l Trade 1987); *Bowe Passat Reinigungs-Und Waschereitechnik Gmbh v. United States*, 926 F.Supp. 1138, 1150 (Ct. Int'l Trade 1996)). It also distinguished the *EC—Bed Linen* report because it (1) did not address the U.S. practice of zeroing, and (2) dealt with an antidumping investigation rather than an administrative review. *Id.* Given that the statute requires Commerce to calculate dumping duties on an entry-by-entry approach and that previous cases determined that zeroing is a reasonable practice under the statute, the Court of International Trade found Commerce's zeroing practice reasonable. *Id.*

---

cation of the approach in 19 U.S.C. § 1677a(e). *Id.* at 2-4. Consequently, Commerce applied an adverse inference, as authorized by 19 U.S.C. § 1677e(b), and applied the adverse-facts-available rate to the total *entered* value of Koyo's TRBs. *Id.* at 8.

Addressing Timken's arguments that Commerce should have applied the adverse-facts-available rate to the sales value of Koyo's TRBs, the Court of International Trade affirmed Commerce's approach. First, the court found it was consistent with the regulations, see 19 C.F.R. § 351.212(b)(1), and prior court holdings. *Timken*, 240 F.Supp.2d at 1233 (citing *NTN Bearing Corp. of Am. v. United States,* 186 F.Supp.2d 1257, 1315 (Ct. Int'l Trade 2002)). Second, according to the court, Commerce properly adhered to the overriding goal of accurately determining dumping margins, rather than creating an overly punitive result. *Id.* at 1234. Because the value of Koyo's TRBs increased substantially as a result of post-importation manufacturing, and because subjecting this increase to duties would have been contrary to the purpose of the anti-dumping statute, the court found that Commerce reasonably used the entered value. *Id.* at 1234-35. The Court of International Trade therefore upheld Commerce's application of the adverse-facts-available rate to Koyo's entered value; Commerce's decision was supported by substantial evidence and not contrary to law. *Id.*

Koyo filed a timely appeal; Timken filed a timely cross appeal. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(5).

II

In reviewing the Court of International Trade's review of a final determination issued by Commerce, we apply "anew" the statutorily-mandated standard of review. Accordingly, we will "uphold Commerce's determination unless it is 'unsupported by substantial evidence on the record, or otherwise not in accordance with law.'" *Micron Tech., Inc. v. United States*, 117 F.3d 1386, 1393 (Fed.Cir.1997) (quoting 19 U.S.C. § 1516a(b)(1)(B)(i)).

A

On appeal, Koyo argues that Commerce acted unreasonably in zeroing negative-margin transactions. It contends this practice violates 19 U.S.C. § 1677b(a), which calls for a "fair comparison" of export price ("EP") or CEP and normal value. Koyo relies on the WTO Appellate Body's decision in *EC—Bed Linen*, holding that the practice of zeroing when calculating dumping margins is *not* a "fair comparison" between EP or CEP and normal value. Thus, because § 1677b(a) specifically implements the "fair comparison" requirements of Article 2.4 of the ADA, and because Commerce refused to interpret the statute in a manner consistent with U.S. international obligations by ignoring the holding in *EC—Bed Linen*, Koyo asks that we find that Commerce acted unreasonably in zeroing negative-margin transactions.

Timken and the United States respond that the plain meaning of the antidumping statute calls for Commerce to zero negative-margin transactions, and that the legislative history confirms this reading. Alternatively, even assuming that the statute contains an ambiguous instruction, Timken and the United States argue that Commerce reasonably interpreted the statute and deserves deference. Addressing Koyo's arguments relying on *EC—Bed Linen*, Timken and the United States reiterate the distinctions between that case and this case articulated by the Court of International Trade. Finally, Timken and the United States argue that 19 U.S.C. § 3512(c) and the SAA bar Koyo from bringing this challenge, and that § 3533 precludes us from addressing the implementation of adverse WTO decisions.

We begin by addressing the government's argument that § 3512(c) bars Koyo from bringing this action. Section 3512(c) bars parties from bringing claims directly against the government on the ground that Commerce acted inconsistently with the Uruguay Round Agreements Act ("URAA"). 19 U.S.C. § 3512(c). As the Court of International Trade

noted, however, Koyo brought this action under U.S. law under the assumption that it would be interpreted so as to avoid a conflict with international obligations. *Timken*, 240 F.Supp.2d at 1242. We agree and find that § 3512(c) does not prevent us from addressing Koyo's appeal.

On the merits of Koyo's appeal, we apply a familiar two-part inquiry to determine whether to sustain an agency's interpretation of the statutory scheme it is charged with administering. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). First, we determine "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* "[I]f the statute is silent or ambiguous with respect to the specific issue," however, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843, 104 S.Ct. 2778. In this case, therefore, we must determine whether the statute unambiguously requires providing for zeroing negative margin transactions and, if not, whether Commerce reasonably interpreted the statute to so require.

Turning to the words of the statute, 19 U.S.C. § 1677(35)(A) defines "dumping margin" as "the amount by which the normal value *exceeds* the export price or constructed export price of the subject merchandise." 19 U.S.C. § 1677(35)(A) (emphasis added). Timken and the United States both argue that the use of the word "exceeds" limits the definition of "dumping margin" to positive numbers. In support of their argument, they appropriately cite dictionaries. *Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1381 (Fed.Cir.2001) ("In order to ascertain the established meaning of a [commonly used] term . . . it is appropriate to consult dictionaries."). These

dictionaries define "exceeds" as "to be or go beyond (the given or supposed limit, measure, or quantity)," *Webster's New Twentieth Century Dictionary of the English Language Unabridged* 636 (2d ed.1980), or "1. To be greater than; surpass. 2. To go beyond the limits of," *The American Heritage College Dictionary* 477 (3d 1993).

Recognizing this as a close question, we are reluctant to find these dictionary definitions so clear as to compel a finding that Congress expressly intended to require zeroing. Even using the above "greater than" definitions, the statute does not plainly require consideration of only those dumping margins with a positive value. At least in a mathematical context, "exceeds" does not unambiguously preclude the calculation of a negative dumping margin. We thus disagree with the government's position that Congress deliberately used the word "exceeds" to avoid the calculation of negative dumping margins, instead of using the more open-ended phrase "difference between." Rather, the word "exceeds" could arguably allow for negative dumping margins because it guides the manner in which to set up the mathematical equation—x "exceeds" y = x-y. Similarly, the words "difference between" could arguably be construed as calling for the absolute value of the difference, a positive number—the "difference between" x and y = |x-y|. Finally, reviewing the legislative history as a whole, we disagree with Timken's argument that the relevant statements, or lack thereof, conclusively demonstrate Congress's adoption of definitions specifically requiring zeroing. Accordingly, we conclude that Congress's use of the word "exceeds" does not unambiguously require that dumping margins be positive numbers.

Because we find that the statute does not directly speak to the issue of negative-value dumping margins, we evaluate whether Commerce's interpretation is based on a permissible statutory construction. Under this second step of the *Chevron* analysis, "[a]ny reasonable construction of the statute is a

permissible construction." *Torrington v. United States*, 82 F.3d 1039, 1044 (Fed.Cir.1996). "To survive judicial scrutiny, [Commerce's] construction need not be the only reasonable interpretation or even the most reasonable interpretation. . . . Rather, a court must defer to an agency's reasonable interpretation of a statute even if the court might have preferred another." *Koyo Seiko Co. v. United States*, 36 F.3d 1565, 1570 (Fed.Cir.1994) (citing *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450, 98 S.Ct. 2441, 57 L.Ed.2d 337 (1978)). Indeed, we have accorded particular deference to Commerce in antidumping determinations. *See Smith-Corona Group v. United States*, 713 F.2d 1568, 1571 (Fed.Cir.1983) ("The Secretary has broad discretion in executing the [anti-dumping] law.").

We conclude Commerce based its zeroing practice on a reasonable interpretation of the statute. First, while the statutory definitions do not unambiguously preclude the existence of negative dumping margins, they do at a minimum allow for Commerce's construction. Basically, one number "exceeds" another if it is "greater than" the other, meaning it falls to the right of it on the number line. Here, because Commerce's zeroing practice is a reasonable interpretation of the statutory language, we do not question it in light of other reasonable possibilities.

Second, Commerce's methodology for calculating dumping margins makes practical sense. Commerce calculates dumping duties on an entry-by-entry basis. 19 U.S.C. § 1675 (a)(2). Its practice of zeroing negative dumping margins comports with this approach. Borrowing Timken's example, suppose a foreign exporter sells the same product to two U.S. customers. The product has a normal value of $0.90, and is sold to the first customer for $1.00 and the second customer for $0.70. Calculated in accordance with § 1677(35)(A), the dumping margin for the first customer is zeroed (0.90-1.00 = -0.10 —> 0) and for the second customer

is 0.20 (0.90-0.70 = 0.20). Assuming sales of 1000 units to each customer, the first customer would not have to pay any dumping duties because it paid a price above normal value, and the second customer would have to pay $200 (1000 transactions x 0.20 dumping margin/transaction = 200) because it paid a price below normal value. This approach makes sense; it neutralizes dumped sales and has no effect on fair-value sales. On the other hand, the approach urged by Koyo, whereby Commerce could not zero negative transactions, would essentially require Commerce to grant the first customer a credit. In the absence of offsetting sales below fair market value, however, Commerce could potentially owe the first customer a payment—a result clearly not contemplated by the statutory scheme.

Third, we note that the Court of International Trade has specifically addressed Commerce's zeroing practice and found it reasonable and in accordance with the law. *See Serampore*, 675 F.Supp. at 1360-61; *Bowe Passat*, 926 F.Supp. at 1150. We find these decisions instructive for purposes of our analysis. Notably, both of these pre-URAA cases found zeroing to be a reasonable statutory interpretation given that it legitimately combats the problem of masked dumping, wherein certain profitable sales serve to "mask" sales at less than fair value. *Serampore*, 675 F.Supp. at 1360-61; *Bowe Passat*, 926 F.Supp. at 1150. Although Koyo argues that these decisions addressed the law as it existed prior to the adoption of the URAA's "fair comparison" requirements, we find this argument unpersuasive. Neither the pre-URAA nor the current definitions unambiguously address the practice of zeroing. The URAA-incorporated "fair comparison" requirement, which simply applies to the calculation of normal value under § 1677b(a), does not change this result. The § 1677(35) definitions do, however, lend support to Commerce's statutory construction (as discussed above), even when considered in light of this new "fair comparison" requirement.

According Commerce its proper deference, we hold that it reasonably interpreted § 1677(35)(A) to allow for zeroing.

We turn now to Koyo's argument that Commerce unreasonably interpreted § 1677(35) to allow for zeroing, beginning with a review of the WTO's *EC—Bed Linen* report upon which Koyo so heavily relies. *EC—Bed Linen* dealt with a trade dispute between the European Community ("EC") and India. *EC—Bed Linen,* WT/DS141/AB/R ¶ 1. The EC, in investigating and levying duties on the importation of bed sheets from India, engaged in the practice of zeroing negative-margin transactions. *See id.* ¶ 8. India brought an action at the WTO, claiming that the EC practice of zeroing violated Article 2.4.2 of the ADA. *See id.* ¶ 1. The WTO Appellate Body evaluated the EC's practice in light of both this article and Article 2.4, which states that one must make a "fair comparison" between the EP or CEP and the normal value when calculating dumping margins. *Id.* ¶¶ 46-66. It took the "fair comparison" language to mean that *all* transactions must be accounted for, whether creating positive or negative dumping margins. *Id.* ¶ 55. Thus, because it was unfair to exclude negative-margin transactions, the WTO Appellate Body concluded that the EC practice of zeroing during an antidumping investigation was impermissible under the ADA. *Id.* ¶ 66.

In light of the decision in *EC—Bed Linen,* Koyo asks us to interpret the "fair comparison" language in the U.S. antidumping statute in a manner consistent with U.S. international obligations, thereby adopting the holding in *EC—Bed Linen* and finding Commerce's zeroing practice an unreasonable statutory interpretation. The crux of its argument hinges on the *Charming Betsy* canon of claim construction, according to which courts should interpret U.S. law, whenever possible, in a manner consistent with U.S. international obligations. *Murray v. Charming Betsy*, 6 U.S. (2 Cranch) 64, 118, 2 L.Ed. 208 (1804); *see also Fed.-Mogul*

*Corp. v. United States*, 63 F.3d 1572, 1581 (Fed.Cir.1995) (noting that trade laws are not exempt from the *Charming Betsy* principle); *Luigi Bormioli Corp. v. United States*, 304 F.3d 1362, 1368 (Fed.Cir.2002) ("[T]he statute must be interpreted to be consistent with [international] obligations, absent contrary indications in the statutory language or its legislative history."). Koyo secondarily relies on its claim that the EC and United States have functionally identical practices that demand similar treatment. Because Commerce has the authority to bring its practice into conformity with U.S. international obligations, Koyo contends, we should find that it was unreasonable for Commerce to continue interpreting the antidumping statute in a non-conforming manner by allowing zeroing.

Koyo's reliance on the "fair comparison" language is misplaced. Section 1677b(a) requires a "fair comparison" as follows: "a fair comparison shall be made between the export price or constructed export price and normal value." 19 U.S.C. § 1677b(a). Thus, "in order to achieve a fair comparison with the export price or constructed export price," *id.*, the statute particularly sets out how to calculate "normal value." *See id.* § 1677b(a)(1)-(8). We agree with the government's position that this is an exhaustive list, and that the "fair comparison" requirement upon which Koyo now relies is specifically defined in the normal-value-calculation instructions. As such, the "fair comparison" requirement of § 1677b(a) does not impose any requirements for calculating normal value beyond those explicitly established in the statute and does not carry over to create additional limitations on the calculation of dumping margins. The SAA supports our conclusion. *SAA, supra*, at 820 ("To achieve such a [fair] comparison, section 773 [§ 1677b] provides for the selection and adjustment of normal value to avoid or adjust for differences between sales which affect price comparability."). This court has also previously recognized that the explicit statutory adjustments help make a "fair, 'apples-to-apples'

comparison" between normal value and EP or CEP. *Micron Tech., Inc. v. United States*, 243 F.3d 1301, 1313 (Fed. Cir.2001) (quoting *Torrington Co. v. United States*, 68 F.3d 1347, 1352 (Fed.Cir.1995)).

Further, even assuming that the "fair comparison" language in § 1677b(a) did not limit the analysis to calculating normal value using the statutorily-prescribed adjustments, we would nonetheless find Commerce's continued practice of zeroing reasonable in light of *EC—Bed Linen.* As Koyo acknowledges, the decision is not binding on the United States, much less this court. While Koyo relies on *EC—Bed Linen* for its persuasive value in an effort to convince us of the unreasonableness of Commerce's zeroing practice, we do not find it sufficiently persuasive to find Commerce's practice unreasonable. In light of the fact that Commerce's "long-standing and consistent administrative interpretation is entitled to considerable weight," *Zenith,* 437 U.S. at 450, 98 S.Ct. 2441, we refuse to overturn the zeroing practice based on *EC—Bed Linen.*

Finally, we disagree with Koyo's assertion that the Court of International Trade erroneously distinguished *EC—Bed Linen.* As discussed above, the court distinguished *EC—Bed Linen* for two reasons: (1) it did not involve the United States, and (2) it dealt with an antidumping investigation as opposed to an administrative review of dumping. We agree with the Court of International Trade and find the absence of the United States as a party to be an important distinction.

As to the difference between an investigation and an administrative review, Koyo contends that the distinction is irrelevant—Article 2.4.2 and Article 9.3.1, dealing with investigations and administrative reviews respectively, should be read together. In addition, Koyo argues, the "fair comparison" requirements of § 1677b(a) do not differ depending on the nature of the action. We disagree and find

that the Court of International Trade properly distinguished the current case over *EC—Bed Linen*.

Because we find Commerce's zeroing practice to be a reasonable interpretation of the statute, even in light of the decision in *EC—Bed Linen*, we do not address the government's or Timken's arguments that this court is statutorily precluded from reconciling the two under 19 U.S.C § 3533.

B

On cross appeal, Timken contends that Commerce should have applied the adverse-facts-available rate to the sales value of Koyo's TRBs rather than the entered value. According to Timken, Commerce failed to effectuate the statutory purpose—to provide an incentive to comply—by applying an insufficiently adverse inference. Thus, Timken argues, relying on *Kawasaki Steel Corp. v. United States*, 110 F.Supp.2d 1029, 1041 (Ct. Int'l Trade 2000), that Koyo improperly gained a more favorable result by refusing to supply the Section E response.

In response, Koyo and the United States argue that Commerce reasonably applied the adverse-facts-available rate to the entered value of Koyo's TRBs. According to Koyo, using the entered value was reasonable because of the significant amount of value added in the United States—on average approximately 25% of the sales value consisted of the entered value—for which Koyo should not have to pay dumping duties. By choosing the entered value as the more reasonable surrogate, Koyo claims, Commerce properly balanced the statutory objectives of finding an accurate dumping margin and inducing compliance.

Again we begin with the relevant law. Commerce has stated that it "normally will calculate the assessment rate by dividing the dumping margin found on the subject merchandise examined by the *entered value* of such

merchandise for normal customs duty purposes." 19 C.F.R. § 351.212(b)(1) (emphasis added). In addition, the statute gives Commerce the discretion to apply an adverse inference if, as here, a party fails to comply with requests for information. 19 U.S.C. § 1677e(b); *see also SAA, supra*, at 870 ("Where a party has not cooperated, Commerce . . . may employ adverse inferences about the missing information to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully."). In keeping with these directives, the Court of International Trade has previously held that CEP can be calculated by applying adverse facts available to a party's entered value when there is further manufacturing. *See NTN Bearing Corp. of Am. v. United States*, 186 F.Supp.2d 1257, 1315 (2002). Finally, in selecting a reasonably adverse facts-available rate, Commerce must balance the statutory objectives of finding an accurate dumping margin and inducing compliance, rather than creating an overly punitive result. *See F.LLI De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed.Cir.2000) ("*De Cecco*").

We conclude that Commerce's decision to use the entered rather than sales value was supported by substantial evidence and supported by law. First, we note that Commerce's methodology was consistent with the regulation, 19 C.F.R. § 351.212(b)(1), as well as the Court of International Trade's decision in *NTN Bearing*. Moreover, under the law, Commerce had no reason to alter its methodology to induce Koyo's compliance.

Second, Commerce has discretion to apply adverse inferences. As both Commerce and the Court of International Trade noted, Commerce is not statutorily required to select a method that is the "most" or "more" reasonably adverse. *Decision Mem.* at 8; *Timken*, 240 F.Supp.2d at 1234. Here, Commerce applied the highest adverse-facts-available rate ever applied in an investigation of Koyo's dumping—

41.04%. By using this high rate, Commerce reasonably attempted to induce Koyo's compliance with the Section E request. But in applying this rate to the entered value rather than the sales value, Commerce appropriately balanced the goal of accuracy against the threat of an unduly punitive result. *See Decision Mem.* at 8. Contrary to Timken's arguments, this demonstrates Commerce's adherence to the principles in *Kawasaki*. Given the significant amount of post-importation manufacturing that took place—the entered value represented on average 25% of the sales value—we find that Commerce's decision to use the entry value was in keeping with the statutory goals highlighted in *De Cecco*. Moreover, as the Court of International Trade noted, this value increase should not be subject to duties because it occurs after importation. To do so would be contrary to the inherent purpose of the antidumping statute—to prevent below-fair-market-value *imports*.

Timken challenges Commerce's conclusion that Timken's approach would be unduly punitive. In particular, Timken argues that Commerce erroneously found the substantial increase in value attributed to post-importation manufacturing necessarily implies that applying the adverse-facts-available rate to the sales value creates a punitive result. According to Timken, the information regarding entered and sales values did not in fact provide Commerce with sufficient information about production costs or dumping margins to support that conclusion.

We disagree, and defer to Commerce's analysis in light of its extensive experience with and knowledge of Koyo's further-manufactured sales and the value added in the United States following importation. *See Decision Mem.* at 6. Despite Koyo's failure to comply with the Section E request, Commerce had other information from Koyo demonstrating that the value added in the United States substantially exceeded the entry value. As the Court of International Trade

also noted, Commerce is "in the best position, based on its expert knowledge of the market and the individual respondent, to select adverse facts that will create the proper deterrent to non-cooperation with its investigations and assure a reasonable margin." *De Cecco*, 216 F.3d at 1032. We similarly find that Commerce's expertise with and knowledge of Koyo's further manufacturing allowed it to select adverse facts to effectuate the statutory goals.

Based on the above, we find that Commerce reasonably applied the adverse-facts-available rate to the entered value. We therefore uphold the Court of International Trade's finding that "Commerce's application of adverse facts available to Koyo's entered value as supported by substantial evidence and in accordance with law." *Timken*, 240 F.Supp.2d at 1235.

## CONCLUSION

For the foregoing reasons, we affirm the Court of International Trade's conclusion that Commerce's final results are supported by substantial evidence and otherwise in accordance with law.

*AFFIRMED.*

## APPENDIX B

UNITED STATES COURT OF INTERNATIONAL TRADE.

---

SLIP OP. 02-106.
Court No. 01-00127.

---

THE TIMKEN COMPANY,

*Plaintiff,*

v.

UNITED STATES,

*Defendant,*

and

KOYO SEIKO, CO., LTD. and KOYO CORPORATION OF U.S.A.; NTN BEARING CORPORATION OF AMERICA, AMERICAN NTN BEARING MANUFACTURING CORPORATION, NTN BOWER CORPORATION and NTN CORPORATION; NSK LTD., and NSK CORP.

*Defendant-Intervenors.*

---

Sept. 5, 2002.

OPINION

POGUE, Judge.

This consolidated action is before the Court on cross-motions for judgment on the agency record, pursuant to USCIT Rule 56.2. The parties challenge aspects of the Department of Commerce's ("Commerce" or "the Department") final results regarding sales at less than fair value ("LTFV") of Tapered Roller Bearings ("TRBs") from Japan covering the period of October 1, 1998 through September 30, 1999. *See Tapered Roller Bearings and Parts Thereof,*

*Finished and Unfinished, From Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, from Japan*, 66 Fed.Reg. 15,078 (Dep't Commerce Mar. 15, 2001) ("*Final Results*") and the accompanying *Issues and Decision Memorandum*, P.R. Doc. No. 141 (Mar. 7, 2001) ("*Decision Mem.*"). The parties include several foreign and domestic producers of TRBs. The Court has jurisdiction over this matter pursuant to 19 U.S.C. § 1516a(a)(2)(B) and 28 U.S.C. § 1581(c).

Foreign TRB producers Koyo Seiko Ltd. and Koyo Corp. of America (collectively "Koyo") claim (1) Commerce violated its international obligations by applying the "arm's-length" test to exclude certain home market sales to affiliated customers; (2) Commerce violated its international obligations by "zeroing" the margins on negative-margin transactions when calculating Koyo's weighted average dumping margins; and (3) Commerce erred in its treatment of imputed expenses in the calculation of profit for Koyo's CEP sales.[1]

Domestic producer The Timken Company ("Timken") argues that (1) Commerce improperly calculated Koyo's constructed export price ("CEP") by applying adverse facts to Koyo's entered value, rather than Koyo's sales value; and (2) for purposes of a level of trade ("LOT") adjustment to NTN's normal values, Commerce erred in its decision to weight percentage differences in sales prices observed at different

---

[1] Koyo initially also argued that Commerce erred by using "adverse facts available" for calculating margins on subject merchandise further processed in the United States. *See* Koyo's Am. Compl. at 4-5. Koyo reasoned that because it met the criteria described in 19 U.S.C. 1677a(e), Commerce was no longer authorized to request Section E data. *See* Koyo's Mem. Supp. Mot. J. Agency R. at 16-17 ("Koyo's Motion"); *see also* note 6, *infra*. As a result, Koyo believed its noncompliance was justified, and thus, application of adverse facts available would be improper. Koyo's Mot. at 13-14. Prior to oral argument, Koyo abandoned this claim. *See* Letter from Sidley, Austin, Brown & Wood to United States Court of International Trade at 1 (July 31, 2002).

levels of trade by the sum of the quantities of sales at both levels of trade, rather than the lesser of the sales quantities of the two LOTs being compared.[2]

In response to Timken's second claim, NTN argues that Timken's LOT adjustment claim presents no case or controversy, and therefore cannot be considered by this Court. *See* U.S. Const. Art. 3, § 2 (prohibiting issuance of advisory opinions).

## Standard of review

The Court will uphold a final determination by Commerce in an antidumping investigation unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B).

## Discussion

### I. Commerce's Application of Adverse Facts Available to Determine Koyo's Dumping Margin

#### A. Background

An antidumping duty is imposed upon imported merchandise if that merchandise is sold or likely to be sold in the United States at less than fair value, and an industry in the United States is materially injured or is threatened with material injury. *See* 19 U.S.C. § 1673. To determine whether

---

[2] Timken also alleged in its complaint that "[t]he ITA made other clerical errors in calculating the final results that implicate business proprietary information or the calculation methodology used to reach the final results of the administrative review." Timken's Compl. ¶ 6(d). Timken's subsequent Rule 56.2 Motion, however, is limited to its disagreement with treatment of Koyo's further manufactured merchandise and NTN's LOT adjustment. In it's brief, Timken abandoned its other claims. NSK Ltd. and NSK Corp. asks that any action by Timken effecting NSK's rights in this matter be dismissed. Because "any claim which is not pressed is deemed abandoned," *De Laval Separator Co. v. United States*, 1 CIT 144, 146, 511 F.Supp. 810, 812 (1981), we dismiss Timken's action as to NSK.

merchandise is being sold at less than fair value, Commerce compares the price of the imported merchandise in the United States to the normal value ("NV")[3] for the same or similar merchandise in the home market. *See* 19 U.S.C. § 1677b. The United States price is calculated using either the export price ("EP") or constructed export price ("CEP"). *See* 19 U.S.C. § 1677a(a), (b). Commerce uses a CEP if, "before or after the time of importation, the first sale to an unaffiliated person is made by (or for the account of) the producer or exporter or by a seller in the United States who is affiliated with the producer or exporter." Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103-826 (1994), *reprinted in* 1994 U.S.C.C.A.A.N. 4040, at 822 ("SAA").[4] Various adjustments may be made to CEP, including reduction by "the cost of any further manufacture or assembly" in the U.S. *See* 19 U.S.C. § 1677a(d)(2).

Here, Commerce chose to use CEP.[5] As there was value added to the subject merchandise in the United States after importation, Commerce required a Section E response from Koyo.[6] Koyo, however, chose not to file Section E of the questionnaire. *See* Letter from Koyo Seiko Co. to the Department of Commerce, P.R. Doc. No. 59 at 6 (May 2, 2000) ("Koyo's Refusal Letter"). As a result of Koyo's deliberate noncompliance, Commerce calculated Koyo's CEP

---

[3] NV is "the price at which the foreign like product is first sold . . . for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade." 19 U.S.C. § 1677b(a)(1)(B)(i).

[4] The SAA is "an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application." 19 U.S.C. § 3512(d).

[5] Commerce's decision to use CEP is unchallenged by any of the parties.

[6] Section E contains a request for sales and cost information for Koyo's further-manufactured sales. *See* Commerce's Request for Information at Section E, P.R. Doc. No. 14 at E-2.

using adverse facts available. Commerce chose as adverse facts available the rate of 41.04 percent. *Decision Mem.* at 8. This was the cash deposit rate established in the 1993-94 administrative review, *see Tapered Roller Bearings and Parts Thereof, Finished and Unfinished From Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, from Japan*, 63 Fed.Reg. 20,585, 20,611 (Dep't Commerce 1998), and the highest rate ever calculated for Koyo in any segment of the A-588-604 case. *Decision Mem.* at 8. Commerce applied this rate to the entered value of Koyo's further-manufactured merchandise in order to calculate Koyo's CEP.

While Commerce's decision to use adverse facts is undisputed, Timken believes that Commerce's application of adverse facts to Koyo's entered value did not create a fully adverse inference. Timken's Mem. Supp. Mot. J. Agency R. at 12 ("Timken's Mem."). Timken points out that Commerce used the same methodology here as in previous administrative reviews in which Koyo also refused to supply further-manufactured information. *See id.* at 8-12; *see also Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, from Japan*, 65 Fed.Reg. 11,767 (Dep't Commerce March 6, 2000) (1997-98 review period); 63 Fed.Reg. 2,558 (Dep't Commerce Jan. 15, 1998) (1995-96 review period). Timken argues that Koyo's earlier noncompliance with this methodology suggests that Commerce should alter the methodology in order to obtain Koyo's compliance. Timken's Mem. at 12. Timken suggests that Commerce should apply the percentage rate to Koyo's U.S. sales values, which would result in a higher dumping margin. *Id.* at 10. In essence, Timken argues that Commerce should have applied "a more adverse 'facts available'" to calculate Koyo's dumping margin. *Id.* at 12-13.

Commerce rejected Timken's approach, explaining that the application of the 41.04 rate to Koyo's sales value would be unduly punitive. *Decision Mem.* at 8. Commerce also points out that "Timken has failed to offer arguments or provide record evidence demonstrating that the rate selected is not reasonably adverse." *Id.*

B. Analysis

Commerce's application of the adverse facts available rate to the entered value rather than the sales value is consistent with Commerce's regulation for determining assessment rates, which states that Commerce "normally will calculate the assessment rate by dividing the dumping margin found on the subject merchandise examined by the *entered* value of such merchandise for normal customs duty purposes." 19 CFR § 351.212(b)(1) (emphasis added). Additionally, this Court has previously decided that CEP can be calculated by applying adverse facts available to a party's entered value when there is further manufacturing.[7] *See NTN Bearing Corp. of Am. v. United States*, 26 CIT __, __, 186 F.Supp.2d 1257, 1315 (2002) (sustaining Commerce's application of adverse facts available rate to Koyo's entered value to determine the CEP of Koyo's further manufactured merchandise).[8] We find no reason to change our position on this matter.

Even though the issue and parties are identical, Timken argues that this Court's ruling in *NTN Bearing II* does not

---

[7] The Court's previous decision to uphold the application of adverse facts available to the entered value of subject merchandise was in response to motions from the same parties as in this case.

[8] We refer frequently to several cases entitled *NTN Bearing Corp. v. United States*. Only two of these cases are discussed extensively. References to these two cases will be abbreviated in chronological order. *See NTN Bearing Corp. of Am. v. United States*, 25 CIT __, __, 155 F.Supp.2d 715 (2001), *appeal docketed*, Nos. 02-1180, 02-1181 (Fed.Cir. Feb. 5, 2002) ("*NTN Bearing I*"); *NTN Bearing Corp. of Am. v. United States*, 26 CIT __, __, 186 F.Supp.2d 1257 (2002) ("*NTN Bearing II*").

preclude application of adverse facts available to Koyo's sales value. Timken's Reply Br. Supp. Mot. J. Agency R. at 15. Timken suggests that the difference is in Commerce's knowledge: before *NTN Bearing II*, Commerce could not have known Koyo would repeatedly decline to comply with Commerce's requests for Section E data, whereas after *NTN Bearing II*, Commerce should have known that Koyo's noncompliance would continue. *Id.* at 16. In other words, Timken argues, Commerce should alter its methodology (i.e. apply the percentage rate to sales values instead of entered values) in order to effectively induce Koyo's compliance. *Id.*

This argument is flawed for several reasons. First, Commerce has increased Koyo's rate since *NTN Bearing II*, from 36.21 percent, *see Tapered Roller Bearings*, 63 Fed.Reg. at 2,562, to the rate of 41.04 percent used here. Timken's argument that Commerce's methodology does not attempt to induce Koyo's compliance fails to recognize the higher dumping margin imposed by this higher rate.

Second, although it is true that Commerce applied the same rate of 41.04 percent in this review as it did in a previous administrative review for Koyo that took place after *NTN Bearing II*, *see* Issue and Decision Mem., *Tapered Roller Bearings*, 65 Fed.Reg. 11,767 at Comment 1, Commerce is "not required by the statute to select a method that is 'the most' or 'more' reasonably adverse." *See NTN Bearing II*, 26 CIT at __, 186 F.Supp.2d at 1315 (agreeing with Commerce that it need not apply the most or more adverse facts) (internal citations and quotations omitted). Rather, Commerce should adhere to the overriding goal of the antidumping law, which is not to create a punitive result, i.e., "unreasonably high rates with no relationship to the respondent's actual dumping margin," *F.LLI De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed.Cir.2000) ("De Cecco"), but rather to create a result that determines "current margins as accurately as possible."

*Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed.Cir.1990); *NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1208 (Fed.Cir.1995).

In using the 41.04 percent rate and applying that rate to Koyo's entered value, Commerce is appropriately balancing this goal of accuracy against the risk of creating a punitive margin. Commerce specifically declined to apply adverse facts to Koyo's sales value because it believed that such an application "would be unduly punitive, given that a substantial amount of value was added to the imported components in the United States." *Decision Mem.* at 8. Commerce reasonably denied Timken's suggestion to apply adverse facts to a value that has been substantially increased after importation because such an application could result in an unreasonably high dumping margin. Commerce's decision therefore adheres to the purpose of and restrictions on adverse facts available. *See De Cecco,* 216 F.3d at 1032; *Reiner Brach GmbH & Co. KG v. United States*, 26 CIT __, 206 F.Supp.2d 1323 (2002).

Timken questions Commerce's ability to determine that Timken's suggested approach would be punitive, because Koyo failed to supply any information upon which Commerce could make a fact-based estimate. Timken's Mem. at 14. However, Commerce has "extensive experience with and knowledge of Koyo's further-manufactured sales and the calculation of the value added in the United States with respect to these sales." *Decision Mem.* at 6. Additionally, Koyo submitted data to Commerce, which Commerce verified, demonstrating that the value added in the United States substantially exceeds the value of the imported merchandise. *See* Letter from Koyo Seiko Co. to the Department of Commerce, P.R. Doc. No. 37 (Feb. 11, 2000), *amended by* Letter from Koyo Seiko Co. to the Department of Commerce, P.R. Doc. No. 59 at 2 (Oct. 2, 2000); Letter from Koyo Seiko Co. to the Department of Commerce, P.R. Doc. No. 55 at 2

(October 24, 2000). Therefore, even without Koyo's Section E response, Commerce still had enough information to make a reasonable assessment of the impact of applying adverse facts. Commerce is "in the best position, based on its expert knowledge of the market and the individual respondent, to select adverse facts that will create the proper deterrent to non-cooperation with its investigations and assure a reasonable margin." *De Cecco*, 216 F.3d at 1032.

Finally, because Commerce determined that "a substantial amount of value was added to the imported components in the United States," Timken's suggested methodology—that Commerce apply its adverse facts to Koyo's sales value—would effectively apply a dumping margin to value added after the merchandise was imported into the United States. *Decision Mem.* at 8. Such a result is contrary to the purpose of the anti-dumping investigation, which is to "determine whether dumping duties should be imposed on subject merchandise *when it is imported into* the United States." *Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1374 (Fed.Cir.2001) (emphasis added).

In sum, Timken offers no evidence demonstrating that the rate selected is not reasonably adverse, nor any well-founded claim that Commerce's chosen methodology is not in accordance with law. For these reasons, this Court upholds Commerce's application of adverse facts available to Koyo's entered value as supported by substantial evidence and in accordance with law.

II. Level of Trade ("LOT") Adjustment for NTN

Because normal value is based on exporting country ("EC") sales at the same LOT as the EP or CEP,[9] 19 U.S.C.

---

[9] Sales are made at different levels of trade "if they are made at different marketing stages (or their equivalent)." Antidumping Manual, Chap. 8 at 53; 19 C.F.R. § 351.412(c)(2).

§ 1677b(a)(7) directs Commerce to adjust normal value to account for any price differential between sales at different LOTs. In order to determine the amount of the adjustment, "Commerce for each NTN model sold at both LOTs in the [home market] calculated the difference between the weighted-average prices at the two LOTs as a percentage of the weighted-average price at the comparison LOT." Def.'s Mem. Opp'n Pls' Mot. J. Agency R. at 26 ("Def.'s Mem."); 19 C.F.R. § 351.412(e).[10] The LOT adjustment was then calculated by applying the weighted-average percentage price difference to the normal value determined at the comparison LOT. Def.'s Mem. at 26; *see generally* Mem. from Deborah Scott, Case Analyst, *Analysis Memorandum For Preliminary Results of the 1998-99 Review—NTN Corporation*, P.R. 117 (Oct. 31, 2000).[11]

Here, Commerce adjusted NTN's EP sales for price differentials accounted for by different levels of trade. Timken argues that Commerce's computer program used the sum of the sales of models at both levels of trade to weight

---

[10] Commerce's implementing regulation for LOT adjustments provides:

> (e) *Amount of adjustment.* The Secretary normally will calculate the amount of a level of trade adjustment by:
>
> (1) Calculating the weighted-averages of the prices of sales at the two levels of trade identified in paragraph (d), after making any other adjustments to those prices appropriate under section 773(a)(6) of the Act and this subpart;
>
> (2) Calculating the average of the percentage differences between those weighted-average prices; and
>
> (3) Applying the percentage difference to normal value, where it is at a different level of trade from the export price or constructed export price (whichever is applicable), after making any other adjustments to normal value appropriate under Section 773(a)(6) of the Act and this subpart.

19 C.F.R. § 351.412(e).

[11] This practice has been applied consistently by Commerce.

prices, and that this practice produces erroneous results and provides respondents with an opportunity to "game the system with isolated single sales." Timken's Mem. at 22.[12] Rather, according to Timken, Commerce should weight the price based on the actual number of instances where there are actual price differences. *Id.* at 21-23. Timken poses several hypothetical sets of facts that it claims demonstrate that Commerce's methodology produces distorted results. *See, e.g., id.* at 22-23.

Timken's hypothetical examples, however, do not prove that Commerce's methodology for calculating the LOT adjustment produces distortive and therefore unreasonable results in this instance. Aside from providing the hypothetical examples, Timken does not offer any evidence that Commerce's weighted averages for NTN in this review were distorted. Nor does Timken accuse NTN of attempting to "game the system;" rather, Timken argues that it is possible that some unspecified party could take advantage of the system.

Moreover, in promulgating its implementing regulation, 19 C.F.R. § 351.412(e), Commerce considered proposals similar to Timken's, that it "should base the amount of any adjustment on the pattern of consistent price differences, rather than on a weighted average." *Antidumping Duties; Countervailing Duties; Final Rule*, 62 Fed.Reg. 27,296, 27,372 (May 19,

[12] NTN Bearing claims that Timken presents "no case or controversy" and is asking for an "advisory opinion." NTN's Resp. to Timken's Mem. Supp. Mot. J. Agency R. at 4. "In order to satisfy the case or controversy requirement 'a litigant must have suffered some actual injury that can be redressed by a favorable judicial decision.'" *Verson v. United States*, 22 CIT 151, 153, 5 F.Supp.2d 963, 966 (1998) (quoting *Iron Arrow Honor Soc. v. Heckler*, 464 U.S. 67, 70, 104 S.Ct. 373, 78 L.Ed.2d 58 (1983)). While Timken does not cite to specific record evidence regarding NTN, Timken does argue that Commerce's LOT adjustment produces erroneous results whenever it is used, including Commerce's application of the test to NTN's LOT adjustment. Therefore, a case or controversy does exist.

1997) (discussion of section 351.412(e)). Commerce, however, made a policy decision based on the SAA guidelines and rejected this approach. The SAA provides that "[a]ny adjustment under Section 773(a)(7)(A) [19 U.S.C. 1677b(a)(7)(A)] will be calculated as the percentage by which the weighted-average prices at each of the two levels of trade differ in the market used to establish normal value." SAA at 830. Because Commerce's policy choice is reasonable, until a party presents actual evidence that the application of Commerce's methodology is distortive and unreasonable, this Court will respect the agency's legitimate policy decision. *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 966 F.2d 660, 665 (Fed.Cir.1992).

III. Commerce's Application of the 99.5 Percent Arm's Length Test

As noted above, "normal value" is defined as "the price at which the foreign like product is first sold . . . for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade." 19 U.S.C. § 1677b(a)(1)(B)(i). The Department's regulations direct it to use sales data to calculate normal value if the Department is "satisfied that the price is comparable to the price at which the exporter or producer sold the foreign like product to a person who is not affiliated with the seller," 19 C.F.R. § 351.403(c), thereby only including data from sales made at arm's length, i.e., in the ordinary course of trade.

Commerce has consistently applied 19 C.F.R. § 351.403(c) through a "99.5 percent arm's-length test." Under this test, the Department compares, on a model-specific basis, the weighted average prices of home market sales of subject merchandise to affiliated customers with the weighted average prices of home market sales of the same model to unaffiliated customers. All home market sales to affiliated customers the weighted average prices of

which are less than 99.5 percent of the weighted average prices of sales to unaffiliated customers are excluded from the calculation of normal value. Sales to affiliated customers at prices that are higher than 99.5 percent of the weighted average price of sales to unaffiliated customers are automatically included, unless the party can prove that those sales are aberrationally high.

In the Final Determination, the Department excluded sales by Koyo to affiliates that failed the Department's "arm's-length" test. All sales at prices above 99.5 percent of the weighted average price to unaffiliated customers, however, were included in the calculation of Koyo's dumping margin. Koyo claims that Commerce's application of the arm's-length test violates Article 2.1 of the Agreement on Implementation of Art. VI of the General Agreement on Tariffs and Trade ("Anti-Dumping Agreement"), as interpreted in recent WTO dispute resolution proceedings, *United States—Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R (Feb. 28, 2001) ("Hot Rolled Steel Panel Report") and WT/DS184/AB/R (July 24, 2001) ("Hot Rolled Steel Appellate Body Report"). *See* Koyo's Mot. at 5-6.

Commerce claims that its arm's length test should be upheld because this Court has previously sustained the test and because Koyo is precluded from seeking a remedy in this Court based on the Anti-Dumping Agreement, pursuant to 19 U.S.C. § 3512(c) and § 3538. Timken also argues that Koyo failed to exhaust its administrative remedies by never raising this issue during the proceeding before the Department.[13]

---

[13] Although the Department argues that Koyo failed to exhaust its administrative remedies for several other claims in Koyo's complaint, there is no mention of this argument by the government with regards to the "arm's-length" test.

A. Exhaustion

As a preliminary matter, the Court addresses Timken's claim that Koyo failed to exhaust its administrative remedies. "The exhaustion doctrine requires a party to present its claims to the relevant administrative agency for the agency's consideration before raising these claims to the Court." *Timken Co. v. United States*, 26 CIT __, __, 201 F.Supp.2d 1316, 1340 (2002). There is, however, "no absolute requirement of exhaustion in the Court of International Trade in non-classification cases." *Consol. Bearings Co. v. United States*, 25 CIT __, __, 166 F.Supp.2d 580, 586 (2001). Rather, Congress vested the Court with discretion, pursuant to 28 U.S.C. § 2637(d), to determine the circumstances under which it is appropriate to require the exhaustion of administrative remedies.

A party "may be excused from its failure to raise the issue before Commerce [where] Commerce in fact considered the issue." *FAG Kugelfischer Georg Schafer AG v. United States*, 25 CIT __, __, 131 F.Supp.2d 104, 114 (2001). The same aspects of the arm's-length test at issue here were raised by NTN in the administrative proceeding below. The danger of the Court deciding the issue before the Department has the opportunity to examine it at the administrative level is not present because the Department did indeed consider and reject an identical claim. *Id.; see also Decision Mem.* at 26-27. Therefore, even though Koyo may have failed to raise the issue in the administrative proceeding, it does not appear reasonable to require further exhaustion in this case.

Moreover, "the Court has exercised its discretion to obviate exhaustion where: (1) requiring it would be futile;" (2) "a subsequent court decision has interpreted existing law after the administrative determination at issue was published, and the new decision might materially affect the agency's actions;" (3) "the question is one of law and does not require further factual development and, therefore, the court does not

invade the province of the agency" by considering the question; or (4) plaintiffs "had no reason to suspect that the agency would refuse to adhere to 'clearly applicable precedent.'" *FAG Kugelfischer Georg Schafer AG v. United States*, 25 CIT at __, 131 F.Supp.2d at 114.

Here, neither the WTO Panel Report nor the Appellate Body Report were issued until after Koyo filed its brief with the Department.[14] To require a party to anticipate the outcome of WTO decisions would be an unreasonable application of the exhaustion requirement. Although WTO Panel Reports and Appellate Body Reports are not binding on this Court, they may help inform the Court's decisions, and therefore it is appropriate to review Koyo's challenge to the Department's application of its arm's length policy in this matter.

B. 19 U.S.C. § 3512(c)

The Department does not address Koyo's argument that the "arm's-length" test violates 19 U.S.C. § 1677b's "fair comparison" requirement and therefore contradicts obligations pursuant to the Antidumping Agreement. Rather, Commerce focuses on 19 U.S.C. § 3512(c), arguing that the statute prohibits private parties from challenging government action on the basis that it violates a WTO agreement. Koyo, however, is not bringing this action under any WTO agreement; rather, Koyo is arguing that the Department's application and interpretation of U.S. law violates its international obligations pursuant to a WTO agreement.

Koyo is certainly "free to argue that Congress would never have intended to violate an agreement it generally intended to implement, without expressly saying so." *Gov't of Uzbekistan v. United States*, 2001 WL 1012780, *3 (CIT Aug. 30, 2001).

---

[14] Koyo filed its case brief with the Department on December 7, 2000. The WTO Panel report, however, was not issued until February 28, 2001 and the Appellate Body report was issued on July 24, 2001.

As in *Uzbekistan*, the Department's reliance on section 3512(c) is an "erroneous technical bar." *Id.* Therefore, Koyo's claim is appropriately before us.

C. WTO Panel Reports

The interaction between international obligations and domestic law is interesting and complex. While an unambiguous statute will prevail over a conflicting international obligation, *Federal-Mogul Corp. v. United States*, 63 F.3d 1572, 1581 (1995), an ambiguous statute should be interpreted so as to avoid conflict with international obligations. *See Murray v. Schooner Charming Betsy*, 2 Cranch 64, 6 U.S. 64, 2 L.Ed. 208 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains. . . ."). In the case of statutory interpretations by agencies, however, judicial review must take place within the confines of either *Chevron* or *Skidmore* deference. *See United States v. Mead Corp.*, 533 U.S. 218, 121 S.Ct. 2164, 150 L.Ed.2d 292 (2001) (discussing *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) and *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S.Ct. 161, 89 L.Ed. 124 (1944)); *but cf. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 574-75, 108 S.Ct. 1392, 99 L.Ed.2d 645 (1988) (holding that *Chevron* may yield to the *Charming Betsy* doctrine).

This Court does not automatically assume that the WTO Panel and Appellate Body decisions are correct interpretations of United States obligations pursuant to the GATT. Rather, they are non-binding decisions, *Hyundai Elec. Co., Ltd. v. United States*, 23 CIT 302, 311, 53 F.Supp.2d 1334, 1343 (1999), the reasoning of which may help inform this Court's decision.[15] 23 CIT at 312, 53 F.Supp.2d at 1343.

---

[15] The ministerial body of the WTO is the only body that can interpret an Appellate Body report. *See* SAA at 662. Furthermore, the response to "an

Here, the WTO Appellate Body found that Commerce's 99.5 percent arm's-length test "does not rest on a permissible interpretation of the term 'sales in the ordinary course of trade,'" found in Article 2.1 of the Anti-Dumping Agreement. Hot Rolled Steel Appellate Body Report ¶ 158 (quoting Hot Rolled Steel Panel Report ¶ 7.112). Article 2.1 of the Anti-Dumping Agreement provides:

> For the purposes of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.

However, neither the WTO Panel nor the Appellate Body found that 19 U.S.C. § 1677b or 19 C.F.R. § 351.403[16] violated the Anti-Dumping Agreement. Rather, the two panels determined that the Department's policy of applying the 99.5 percent arm's-length test resulted in an inflated normal value and lacked "even-handedness." Hot Rolled Steel Appellate Body Report ¶ 154. According to the panels, because all high-priced sales are included, unless the exporter demonstrates through a difficult process that a given sales price is aberrationally high, sales that are not in the ordinary course of trade are often included in the antidumping calculation. Furthermore, the Appellate Body noted that the Department "does not have any standard, nor even guidelines,

---

adverse WTO panel report is the province of the executive branch and, more particularly, the Office of the U.S. Trade Representative." *Hyundai Elecs. Co., Ltd.*, 23 CIT at 312, 53 F.Supp.2d at 1343; 19 U.S.C. § 3538.

[16] As noted above, the Department's regulations provide that it "may calculate normal value based on that sale [to an affiliated party] only if satisfied that the price is comparable to the price at which the exporter or producer sold the foreign like product to a person who is not affiliated with the seller." 19 C.F.R. § 351.403(c).

for determining the threshold of aberrationally high" sales. *Id.* at ¶ 151. Moreover, it was "not clear to [the Appellate Body] that exporters would have known of the rule applied to high-priced sales." *Id.* at ¶ 155. The result, according to the WTO decisions, disadvantages exporters. [17]

The WTO decisions found, and this Court agrees, that the statute and the Department's regulation are consistent with the Anti-Dumping Agreement. As a result, no direct conflict exists between provisions of U.S. law and international obligations. Therefore, we focus solely on the Department's

---

[17] The Appellate Body recommended that "the United States bring its measures found in this Report, and in the Panel Report as modified by this Report, to be inconsistent with the *Anti-Dumping Agreement* and the *WTO Agreement*, into conformity with its obligations under those Agreements." Hot Rolled Steel Appellate Body Report ¶ 241. The United States stated its intention to implement the recommendations and rulings of the Dispute Settlement Body in the Hot-Rolled Steel rulings. "After the DSB adopted its recommendations and rulings on August 23, the United States stated its intention to implement them in a manner consistent with its WTO obligations and engaged in discussions with Japan pursuant to Article 21.3(b) in an effort to reach agreement on the reasonable period of time for U.S. implementation." Submission of the United States, Arbitration on the "Reasonable Period of Time," *United States—Anti-Dumping Measures on Certain Hot-rolled Steel Products from Japan,* ¶ 1 (Jan. 4, 2002). During oral argument for the arbitration proceeding determining the proper amount of time for implementation of the Appellate Body decision, the United States represented "that modification of the '99.5 percent' or 'arm's length' test applied in practice by its administrative officials has already been commenced." Arbitration, *United States—Anti-Dumping Measures on Certain Hot-rolled Steel Products from Japan,* WT/DS184/13 (Feb. 19, 2002) ¶ 33. (holding that the period of time for implementation "which covers both legislative and administrative phases . . ." will accordingly expire on 23 November 2002). Furthermore, on August 15, 2002, the Commerce Department, in the Federal Register, published a request for comments on a proposed change in its arm's length policy. As a result, this Court is in the unfortunate position of reviewing a policy that Commerce has already decided to modify. Nothing in this opinion should be construed as limiting the Department's obligations in this regard.

policy interpreting its statute and regulations. However, the ambiguity of the statutes and regulations as to the definition of "ordinary course of trade," precludes a *Chevron* step-one analysis.[18] Accordingly, the court must determine if the Department's interpretation is reasonable, as informed by *Chevron* step-two and *Charming Betsy*.

This Court has previously upheld Commerce's arm's-length test as a reasonable method for establishing a fair basis of comparison between affiliated and unaffiliated party sales. *See, e.g., Usinor Sacilor v. United States*, 18 CIT 1155, 1158-59, 872 F.Supp. 1000, 1004 (1994); *Micron Tech. Inc. v. United States*, 19 CIT 829, 846-47, 893 F.Supp. 21, 37-38 (1995). Although several parties have argued that the test fails to discover whether the investigated party actually manipulated prices charged to a related party, this Court held that it would continue to "uphold Commerce's arm's length test unless the test was shown to be unreasonable because it distorted price comparability." *SSAB Svenskt Stal AB v. United States*, 21 CIT 1007, 1010, 976 F.Supp. 1027, 1030 (1997). The Court has also explicitly rejected the notion that the arm's length test is flawed because it does not take into account certain qualitative factors other than price. *NSK Ltd. v. United States*, 21 CIT 617, 628-29, 969 F.Supp. 34, 48 (1997). These cases, however, do not appear to consider whether it is reasonable to apply a test that automatically

---

[18] As discussed *supra* page 1239, determination of whether the agency's statutory interpretation is in accordance with law follows the two-step analysis formulated in *Chevron*, 467 U.S. at 837, 104 S.Ct. 2778. If the statute is clear, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43, 104 S.Ct. 2778. If the statute is ambiguous and is expressed in a format that carries the "force of law," *Christensen v. Harris County*, 529 U.S. 576, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000), the agency's interpretation of the statute is entitled to deference as long as it is reasonable. *Chevron*, 467 U.S. at 843-44, 104 S.Ct. 2778.

excludes prices below 99.5 percent while automatically including prices above 99.5 percent.

Investigating authorities, pursuant to their obligations under the Anti-Dumping Agreement, need to verify whether sales are made in the ordinary course of trade. The authorities cannot presume that all affiliate sales are outside the ordinary course of trade; in some circumstances, this may not be the case. As the WTO panels note, however, "in the ordinary course of trade" is not a phrase defined by the Antidumping Agreement. Therefore, investigating authorities have the discretion to choose different methods of testing whether a sale is made within the ordinary course of trade.

Here, Commerce determined that the 99.5 percent arm's length test appropriately excludes sales made outside the ordinary course of trade. The Department excludes sales for which the price ratio is less than 99.5 percent because "on average, that customer was paying less than unrelated customers for the same merchandise." *Usinor Sacilor*, 18 CIT at 1157, 872 F.Supp. at 1003 (1994) (internal citations and quotations omitted). The Appellate Body agreed that "a pattern of prices to affiliated customers, different from the pattern of prices to unaffiliated customers, could indicate that sales were not in the ordinary course of trade." Hot Rolled Steel Appellate Body Report ¶ 135. We agree with the Department that it is reasonable to presume that affiliate sales with a pattern of below average prices are not in the ordinary course of trade. The Appellate Body, however, expressed concern over the fact that the 99.5 percent arm's length policy only determines whether sales to affiliates are, on average, at lower prices than sales to unaffiliated parties, not whether prices might be on average higher to affiliates. Accordingly, what this Court must next consider is whether higher priced sales should be automatically included.

Although higher priced sales are presumed to be included in the calculation of normal value, they may be excluded

upon a showing that they are aberrationally high. The Appellate Body was concerned that "[t]he rule applied to high-priced sales . . . was not contained in any guidelines, or other document conveyed to the interested parties. It is, therefore, not clear to us [the Appellate Body] that exporters would have known of the rule applied to high-priced sales." *Id.* at ¶ 155. Here, however, Koyo concedes that it had notice that Commerce excluded sales demonstrated to be "aberrational." Oral Arg. Trans. at 9-11 (Aug. 2, 2002). In fact, in this same administrative review, NTN tried to demonstrate that some of its high profit sales were outside the ordinary course of trade. *See* Timken's Oral Arg. Ex. 3.

Commerce argues that the investigated parties should have the burden of establishing that high priced sales between affiliated parties are not in the ordinary course of trade. According to Commerce, once a party establishes that the high priced sales are aberrational, the sales are excluded from the calculation of normal value. Commerce applies this asymmetric test because it assumes that investigated parties will supply advantageous information, such as why a high priced sale between affiliated parties is not in the ordinary course of trade, but will be reluctant to supply information that is disadvantageous, such as why low priced sales between affiliated parties are not in the ordinary course of trade. Furthermore, according to Commerce, "[t]he purpose of an arm's length test is to eliminate prices that are distorted. We test sales between two affiliated parties to determine if prices may have been manipulated to lower normal value." *Antidumping Duties; Countervailing Duties; Final Rule*, 62 Fed.Reg. 27,296, 27,356 (May 19, 1997).

It may be that Commerce's application of the 99.5 percent arm's length test could, in another case, lack even-handedness and disadvantage exporters so as to be inconsistent with international obligations under the Anti-Dumping Agreement. In this case, however, we do not find, nor does Koyo argue,

that the application of the 99.5 percent arm's length test results in the inclusion of sales outside the ordinary course of trade in the calculation of Koyo's normal value. Accordingly, because in this case investigated parties control the data at issue, we uphold Commerce's application of its statutes and regulations as a reasonable interpretation of "ordinary course of trade."

IV. Commerce's Practice of Zeroing Negative Margins

Koyo also argues that the Department erred by refusing "to give full mathematical effect to the negative margins . . . in calculating Koyo's (and other respondents') weighted average margins, by setting the negative margins on those transactions at zero." Koyo's Mot. at 34. Koyo points to a recent Appellate Body decision, *European Communities—Antidumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R (Mar. 1, 2001) ("EC-Bed Linen Appellate Body Report"), in arguing that this practice is inconsistent with the Anti-Dumping Agreement. *Id.*

As with the "arm's-length" test, the Department argues that Koyo is barred from seeking a remedy in this Court pursuant to 19 U.S.C. § 3512(c). The Department also claims that WTO cases are not binding on this Court and, more importantly, that to date, the WTO cases have not decided the issue with respect to the zeroing practice of the U.S. Finally, Timken claims that the zeroing practice actually ensures a more accurate antidumping margin.

As discussed above, 19 U.S.C. § 3512(c) does not bar Koyo's claim. This action is commenced under U.S. law, and a party may reasonably assume that the agency will interpret U.S. law so as to avoid a conflict with international obligations.

*EC Bed-Linen* involved the European Community's practice of zeroing "when establishing 'the existence of

margins of dumping.'" EC Bed-Linen Appellate Body Report ¶¶ 45(a), 47. The Appellate Body found EC's "zeroing" practice to be inconsistent with Article 2.4.2 of the EC Anti-Dumping Agreement.[19] Koyo argues that the EC's practice is similar to the one used by the Department.

As Koyo concedes, the Department's zeroing practice has previously been affirmed by this Court, which found it to be a reasonable interpretation of 19 U.S.C. § 1673. *Serampore Indus. Pvt. Ltd. v. Dep't of Commerce*, 11 CIT 866, 874, 675 F.Supp. 1354, 1360-61 (1987); *Bowe Passat Reinigungs-Und Waschereitechnik GmbH v. United States*, 20 CIT 558, 572, 926 F.Supp. 1138, 1150 (1996). The Court, however, has also stated that it would only continue to uphold the Department's practice of zeroing "until it becomes clear that such a practice is impermissible." *Bowe Passat*, 20 CIT at 572, 926 F.Supp. at 1150.

The *EC Bed Linen* report does not invalidate Commerce's zeroing practice. The Appellate Body decision involved a dispute between India and the European Communities, and did not comment on U.S. practices. To date, no comparable WTO case has been decided concerning U.S. zeroing practices. Moreover, although the EC's zeroing practice

---

[19] Article 2.4.2 of the Anti-Dumping Agreement provides:

> Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison.

appears similar to the United States' practice, this Court cannot determine from the Appellate Body report whether they are the same. As noted above, according to the SAA, only the ministerial body of the WTO can interpret an Appellate Body report. *See* SAA at 662 (discussing procedures for making decisions). It is therefore not the province of this Court to determine the extent of the similarities between EC and U.S. zeroing practices based on the Appellate Body decision.

Furthermore, the *EC-Bed Linen* decision involved a comparison, made during an antidumping investigation, of weighted averages for export prices and normal value, while the instant case involves a comparison, made during an administrative review, of weighted-average normal values to transaction-specific export prices. *Decision Mem.* at 33. The Appellate Body was limited to interpreting Article 2.4.2. An administrative review, such as the one at issue here, however, is governed by Article 9.3.1 of the Anti-Dumping Agreement.[20] Although the two proceedings are related, involving the calculation of anti-dumping margins, differences exist between them and each investigation is informed by a different article of the Anti-Dumping Agreement. Here, the statutes require Commerce to calculate a "dumping margin for each such entry." 19 U.S.C. § 1675(a)(2)(A)(ii).

---

[20] Article 9.3.1, provides:

> When the amount of the anti-dumping duty is assessed on a retrospective basis, the determination of the final liability for payment of the anti-dumping duties shall take place as soon as possible, normally within 12 months, and in no case more than 18 months, after the date on which a request for a final assessment of the amount of the anti-dumping duty has been made. Any refund shall be made promptly and normally in not more than 90 days following the determination of final liability made pursuant to this subparagraph. In any case, where a refund is not made within 90 days, the authorities shall provide an explanation if so requested.

Anti-Dumping Agreement, art. 9.3.1.

"Dumping margin" is defined by 19 U.S.C. § 1677(35)(A) as "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." As the statute requires the calculation to be on an entry-by entry approach, and as previous cases determined, Commerce's practice is a reasonable interpretation of 19 U.S.C. § 1675(a)(2)(A), and continues to be a reasonable interpretttation of the statute despite the WTO Panel report. Therefore, *EC-Bed Linen* does not inform the Court on the issue of an administrative review of an existing order.

Therefore, the Appellate Body's decision in *EC-Bed Linen* does not compel a change to this Court's holding in *Bowe Passat*, 20 CIT at 572, 926 F.Supp. at 1150, that the Department's zeroing practice is upheld "until it becomes clear that such practice is impermissible."

V. Commerce's Treatment of Imputed Expenses in the Calculation of Koyo's Constructed Export Price

Koyo argues that the Department's treatment of imputed expenses in the calculation of constructed export price ("CEP") sales is not in accordance with law. The Department contends that the Court should not consider Koyo's challenge because Koyo failed to exhaust its administrative remedies and, even if this Court does consider Koyo's challenge, the Department properly excluded imputed credit and inventory carrying costs in its calculation of CEP.

A. Exhaustion

As previously discussed, *supra* page 1238, there is "no absolute requirement of exhaustion," except in classification cases. *Consol. Bearings Co. v. United States*, 25 CIT at __, 166 F.Supp.2d at 586. The court has the discretion to excuse the failure to exhaust administrative remedies "where appropriate," including when it would be futile to follow the administrative remedy. 28 U.S.C. § 2637(d). Exhaustion is

futile when the agency (1) consistently applies the challenged policy or methodology; (2) issues rules, regulations or bulletins promulgating such policy or methodology; and (3) rejects similar challenges. *See Koyo Seiko Co. v. United States*, 26 CIT __, __, 186 F.Supp.2d 1332, 1339 (quoting *Von Hoffburg v. Alexander*, 615 F.2d 633, 638 (5th Cir.1980)). According to Koyo, "the well-established 'futility' exception to the exhaustion requirement" applies here. Koyo's Reply Br. Supp. Mot. J. Agency R. at 27; *see also Asociacion Colombiana de Exportadores v. United States*, 916 F.2d 1571, 1575 (Fed.Cir.1990) (explaining that "following the administrative remedy would be futile because of certainty of an adverse decision") (internal citations and quotations omitted).

The Department's practice for calculating CEP profit is well-established. In 1997, the Department issued a policy bulletin explaining its methodology for the calculation of profit for CEP transactions. *See Import Administration Policy Bulletin 97-1: Calculation of Profit for Constructed Export Price Transactions* at Step 2. The bulletin made clear that the Department's policy is to include imputed costs such as inventory carrying costs and credit costs in "total U.S. selling expenses" but not in "total expenses." *Id.* Furthermore, the Department has consistently excluded imputed expenses from "total expenses" while including them in "total U.S. selling expenses" in other antidumping proceedings. *See, e.g., Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof from France, et al.*, 64 Fed.Reg. 35,590, 35,623 (July 1, 1999) (final determ.); *Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof from France, et al.*, 62 Fed.Reg. 54,043, 54,072 (Oct. 17, 1997) (final admin. rev.). Accordingly, as Commerce's position has been both issued formally, as a policy bulletin, and consistently applied, we conclude that the policy is so well-established that it would have been futile for Koyo to raise the issue in the administrative proceeding below. *See NTN*

*Bearing Corp. I*, 155 F.Supp.2d at 743. As a result, the Court finds that Koyo was excused from exhausting its administrative remedies in this case.

B. Accordance with Law

Title 19 U.S.C. § 1677a(f) defines "total United States expenses" and "total expenses." "Total United States expenses" refers to "the total expenses described in subsection (d)(1) [commissions for selling the subject merchandise in the U.S., expenses resulting from and bearing a direct relationship to the sale, any selling expenses that the seller pays on behalf of the purchaser and any other selling expenses] and (2) [cost of further manufacture or assembly] of this Section." "Total expenses," on the other hand, includes, in relevant part:

> all expenses in the first of the following categories which applies and which are incurred by or on behalf of the foreign producer and foreign exporter of the subject merchandise and by or on behalf of the United States seller affiliated with the producer or exporter with respect to the production and sale of such merchandise:
>
> (i) The expenses incurred with respect to the subject merchandise sold in the United States and the foreign like product sold in the exporting country if such expenses were requested by the administering authority for the purpose of establishing normal value and constructed export price.
>
> (ii) The expenses incurred with respect to the narrowest category of merchandise sold in the United States and the exporting country which includes the subject merchandise.
>
> (iii) The expenses incurred with respect to the narrowest category of merchandise sold in all countries which includes the subject merchandise.

19 U.S.C. § 1677a(f)(C). In interpreting these two provisions, Commerce includes imputed credit and inventory costs in U.S. total expenses as an expense having a direct relation to the sale. Commerce, however, does not impute credit and inventory expenses in total expenses where total expenses include actual credit and inventory costs.

In *NTN Bearing I* this Court addressed the Department's practice of excluding imputed expenses from "total expenses" but including them in "total U.S. expenses." The *NTN Bearing I* court found that the Department's practice ignored the plain language of the statute and that the Department must include imputed credit and inventory carrying costs in total expenses when they are included in total U.S. expenses. *NTN Bearing I*, 155 F.Supp.2d at 743. The Department, however, contends that *NTN Bearing I* is not dispositive of the issue because it conflicts with the appellate decision in *U.S. Steel Group v. United States*, 225 F.3d 1284 (Fed.Cir.2000).

In *U.S. Steel Group*, the Court of Appeals for the Federal Circuit found that symmetry between "total expenses" and "total U.S. expenses" was not necessary, in which case movement expenses could be included in one but not the other. Furthermore, the court found that total U.S. expenses were not a subset of total expenses. The Department now argues that *U.S. Steel Group* stands for the proposition that symmetry need not exist in the ratio for CEP transactions used here.

Unlike the court in *NTN Bearing II*, we do not believe that the statute clearly addresses the use of imputed expenses in the calculation of total expenses or total actual profit. Furthermore, we believe, as held in *U.S. Steel Group*, that Congress defined total United States expenses and total expenses differently. We agree with the Department that although the court in *U.S. Steel Group* focused on "movement expenses," the reasoning of that case is applicable here.

The Federal Circuit in *U.S. Steel Group* looked at the relevant statutory provisions, 19 U.S.C. § 1677a, as a whole. The court held that "[t]he statute itself defines 'total U.S. expenses' distinctly, both structurally and substantively, from 'total expenses.'" 225 F.3d at 1289. Although the court focused on movement expenses, it still found that total expenses and total U.S. expenses were defined "very differently." Here, although the definitions of both total U.S. expenses and total expenses direct Commerce to include a figure for selling expenses, it is not clear from the statute that these figures need to be precisely the same.

Furthermore, even if *U.S. Steel* does not apply to selling expenses, Commerce's methodology is a reasonable interpretation of the statute. In this situation, Commerce included a category of expenses, inventory and credit costs, when calculating both total U.S. expenses in the numerator and total expenses in the denominator of the ratio. As this Court explained in *Thai Pineapple*, imputed selling expenses when included in calculating total U.S. expenses also need to be included in the calculation for total expenses "*unless* they are already represented in total expenses in some other fashion." *Thai Pineapple Canning Indus. Corp., Ltd. v. United States*, 23 CIT 286, 296, 2000 WL 174986 (2000), *aff'd in part, rev'd in part*, 273 F.3d 1077 (Fed.Cir.2001) ("*Thai Pineapple I*")[21] (emphasis added) (citing *U.S. Steel*, 15 F.Supp.2d at 898).[22] Here, Koyo provided Commerce with both

---

[21] Although Commerce cites to *Thai Pineapple I* as adverse to its position we are of a contrary mind.

[22] *Thai Pineapple I* was remanded to Commerce in order for the agency to "demonstrate . . . that the total expense denominator of the ratio to be applied to total actual profit to obtain the CEP profit adjustment contains all interest expenses (including those relating to U.S. sales) as required by 19 U.S.C. § 1677a(f)(2)(C)." *Thai Pineapple Canning Indus. Corp. Ltd. v. United States*, 2000 WL 174986, **5-6 (CIT Feb. 10, 2000) ("*Thai Pineapple II*").

"imputed" numbers representing inventory and credit costs on a per-model basis for U.S. sales and "actual" numbers for total credit and inventory costs.[23] Commerce excluded imputed credit and inventory carrying costs from total expenses and total actual profit because these expenses were already accounted for; total expenses merely uses actual figures while U.S. expenses uses imputed. Therefore, the category of expenses at issue—inventory and carrying costs—are included in both total expenses and total U.S. expenses. This is consistent with *U.S. Steel* and the *Thai Pineapple* cases. *See, e.g., Thai Pineapple I*, 23 CIT at 289, 2000 WL 174986 (holding that "imputed expenses should be omitted from actual profit if they duplicate expenses already accounted for").

This practice is further supported by Commerce's preference for the use of *actual* cost information rather than *imputed* cost information when possible. *See, e.g.*, Antidumping Manual, Chap. 8 at 23-25 ("Our preference is to use actual credit cost information if it is available. If actual expenses are not available, we impute the cost of credit. . . .").[24] Rather than using a proxy, actual figures for the interest expenses of inventory and credit costs were included in the calculation of total expenses and total actual profit. While the imputed numbers used in total U.S. expenses may not be exactly the same as those used in total expenses, one is a reasonable surrogate for the another.

---

[23] Commerce requests respondents to report total interest expenses covering inventory carrying costs and credit extension expenses for cost of production purposes. "For price adjustment purposes, however, Commerce requires respondents to impute interest expenses separately for U.S. sales, even though companies may not account for such expenses separately." *Thai Pineapple II*, 2000 WL 174986, *6.

[24] It should be noted that while the *Antidumping Manual* "is not a binding legal document, it does give insight into the internal operating procedures of Commerce." *Koenig & Bauer-Albert AG v. United States*, 24 CIT __, __, 90 F.Supp.2d 1284, 1292 n. 13 (2000), *aff'd in part, vacated in part, remanded by* 259 F.3d 1341 (Fed.Cir.2001).

*See, e.g., Thai Pineapple II*, 2000 WL 174986, * 6 ("Theoretically, the total expenses denominator would reflect the interest expenses captured in the U.S. sales expenses numerator . . . as well as 'home' market interest expenses, because the total expenses denominator is derived from a net unit figure based on all company interest expenses without regard to sales destination."). Moreover, "[c]ompanies may not keep track of the costs of maintaining inventory or extending credit to their customers on a per-model basis. Nonetheless, they are real costs that a company incurs. The Department asks respondents to provide measures of these costs, to 'impute' them for purpose of determining normal value and U.S. price." Timken's Resp. to Koyo's Mot. J. Agency R. at 39. Therefore, even if total U.S. expenses are a subset of total expenses for selling cost purposes, inventory and credit costs are accounted for in both parts of the ratio.

Accordingly, this Court, consistent with the federal circuit's analysis in *U.S. Steel Group*, upholds the Department's practice of excluding imputed expense in "total expenses" when actual expenses are used as that practice was applied here.

## Conclusion

The Department's final results are, therefore, affirmed as being supported by substantial evidence and otherwise in accordance with law.

**APPENDIX C**

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

---

03-1098, 03-1238

---

THE TIMKEN COMPANY,
*Plaintiff-Cross Appellant*,

v.

UNITED STATES,
*Defendant-Appellee*,

v.

KOYO SEIKO CO., LTD. and KOYO CORPORATION OF U.S.A.,
*Defendants-Appellants*,

and

NTN BEARING CORPORATION OF AMERICA, AMERICAN NTN BEARING MANUFACTURING CORPORATION, NTN BOWER CORPORATION, NTN CORPORATION, NSK LTD., and NSK CORPORATION,

*Defendants*.

---

March 17, 2004, Decided
March 17, 2004, Filed

---

JUDGES: Before NEWMAN, Circuit Judge, BRYSON, Circuit Judge, and PROST, Circuit Judge.

OPINION:

ORDER

A petition for rehearing having been filed by the APPELLANTS,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED.

The mandate of the court will issue on March 24, 2004.

**APPENDIX D**

UNTIED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

---

03-1098, -1238

---

THE TIMKEN COMPANY,

*Plaintiff-Cross Appellant,*

v.

UNITED STATES,

*Defendant-Appellee,*

v.

KOYO SEIKO CO., LTD. and
KOYO CORPORATION OF U.S.A.,

*Defendants-Appellants,*

and

NTN BEARING CORPORATION OF AMERICA, AMERICAN NTN BEARING MANUFACTURING CORPORATION, NTN BOWER CORPORATION, NTN CORPORATION, NSK LTD., AND NSK CORPORATION,

*Defendants.*

---

***ORDER***

Upon consideration of the motion of defendants-appellants Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A. (collectively "Koyo") for recall and stay of this Court's mandate, it is hereby

ORDERED that Koyo's motion is granted; and it is further

ORDERED that the mandate issued pursuant to this Court's order dated March 17, 2004 in the above-captioned proceeding is hereby recalled; and it is further

ORDERED that the mandate of this Court shall be stayed pending the filing by Koyo of a petition for a writ of certiorari in the U.S. Supreme Court, and that during the period in which the mandate is stayed, the injunction pending appeal issued by the Court of International Trade on March 11, 2003, in *The Timken Co. v. United States* (Consol. Court No. 01-00127), shall remain in effect as to Koyo's entries; and it is further

ORDERED that this stay shall remain in effect for the time period set forth in Rule 41(2)(B) of the Federal Rules of Appellate Procedure.

SO ORDERED.

FOR THE COURT

DATE: APR 22 2004

/s/ Jan Horbaly/JB
JAN HORBALY
Clerk

[Filed APR 22 2004]

# APPENDIX E

## STATUTORY PROVISIONS

19 U.S.C. § 1673. Imposition of antidumping duties

If—

(1) the administering authority determines that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value, and

(2) the Commission determines that—

(A) an industry in the United States—

(i) is materially injured, or

(ii) is threatened with material injury, or

(B) the establishment of an industry in the United States is materially retarded,

by reason of imports of that merchandise or by reason of sales (or the likelihood of sales) of that merchandise for importation,

then there shall be imposed upon such merchandise an antidumping duty, in addition to any other duty imposed, in an amount equal to the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise.

* * * *

(June 17, 1930, c. 497, Title VII, § 731, as added July 26, 1979, Pub.L. 96- 39, Title I, § 101, 93 Stat. 162, and amended Oct. 30, 1984, Pub.L. 98-573, Title VI, § 602(b), 98 Stat. 3024; Dec. 8, 1994, Pub.L. 103-465, Title II, § 233(a)(1)(A), (2)(A)(i), 108 Stat. 4898.)

19 U.S.C. § 1677. Definitions; special rules

For purposes of this subtitle—

(1) Administering authority. The term "administering authority" means the Secretary of Commerce, or any other officer of the United States to whom the responsibility for carrying out the duties of the administering authority under this subtitle are transferred by law.

* * * *

(34) Dumped; dumping. The terms "dumped" and "dumping" refer to the sale or likely sale of goods at less than fair value.

(35) Dumping margin; weighted average dumping margin

(A) Dumping margin. The term "dumping margin" means the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise.

(B) Weighted average dumping margin. The term "weighted average dumping margin" is the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer.

* * * *

(June 17, 1930, c. 497, Title VII, § 771, as added July 26, 1979, Pub.L. 96- 39, Title I, § 101, 93 Stat. 176, and amended Oct. 30, 1984, Pub.L. 98-573, Title VI, § 612(a), 98 Stat. 3033; Oct. 22, 1986, Pub.L. 99-514, Title XVIII, § 1886(a)(9), 100 Stat. 2922; Aug. 23, 1988, Pub.L. 100-418, Title I, §§ 1312, 1316(b), 1326(a) to (c), 1327 to 1330, 1335, 102 Stat. 1184, 1187, 1203 to 1207, 1210; Sept. 28, 1988, Pub.L. 100-449, Title IV, § 403(d), 102 Stat. 1887; Nov. 10, 1988, Pub.L. 100-647, Title IX, § 9001(a)(5), 102 Stat. 3807; Aug. 20, 1990, Pub.L. 101-382. Title I, § 139(a)(3), Title II,

§ 224(a), (b), 104 Stat. 653, 659, 660; Dec. 8, 1993, Pub.L. 103-182, Title IV, § 412(b), Title VI, 637(b), 107 Stat. 2146, 2203; Dec. 8, 1994, Pub.L. 103-465, Title II, §§ 221(b), 222, 229(b), 233(a)(3), (4), (5)(BB) to (FF), (b), 251, 266, 267, 270(c)(2), (e), 108 Stat. 4869, 4890, 4898, 4900, 4901, 4902, 4915, 4917, 4918; Oct. 11, 1996, Pub.L. 104-295, § 20(b)(7), (14), 110 Stat. 3527.)

19 U.S.C. § 1677b. Normal value

(a) Determination. In determining under this subtitle whether subject merchandise is being, or is likely to be, sold at less than fair value, a fair comparison shall be made between the export price or constructed export price and normal value. In order to achieve a fair comparison with the export price or constructed export price, normal value shall be determined as follows:

(1) Determination of normal value.

(A) In general. The normal value of the subject merchandise shall be the price described in subparagraph (B), at a time reasonably corresponding to the time of the sale used to determine the export price or constructed export price under section 1677a(a) or (b) of this title.

(B) Price. The price referred to in subparagraph (A) is—

(i) the price at which the foreign like product is first sold (or, in the absence of a sale, offered for sale) for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade and, to the extent practicable, at the same level of trade as the export price or constructed export price, or

(ii) in a case to which subparagraph (C) applies, the price at which the foreign like product is so sold (or offered for sale) for consumption in a country other than the exporting country or the United States, if—

(I) such price is representative,

(II) the aggregate quantity (or, if quantity is not appropriate, value) of the foreign like product sold by the exporter or producer in such other country is 5 percent or more of the aggregate quantity (or value) of the subject merchandise sold in the United States or for export to the United States, and

(III) the administering authority does not determine that the particular market situation in such other country prevents a proper comparison with the export price or constructed export price.

(C) Third country sales. This subparagraph applies when—

(i) the foreign like product is not sold (or offered for sale) for consumption in the exporting country as described in subparagraph (B)(i),

(ii) the administering authority determines that the aggregate quantity (or, if quantity is not appropriate, value) of the foreign like product sold in the exporting country is insufficient to permit a proper comparison with the sales of the subject merchandise to the United States, or

(iii) the particular market situation in the exporting country does not permit a proper comparison with the export price or constructed export price.

For purposes of clause (ii), the aggregate quantity (or value) of the foreign like product sold in the exporting country shall normally be considered to be insufficient if such quantity (or value) is less than 5 percent of the aggregate quantity (or value) of sales of the subject merchandise to the United States.

(2) Fictitious markets. No pretended sale or offer for sale, and no sale or offer for sale intended to establish a fictitious market, shall be taken into account in determining normal value. The occurrence of different movements in the prices at which different forms of the foreign like product are sold (or, in the absence of sales, offered for sale) in the exporting country after the issuance of an antidumping duty order may be considered by the administering authority as evidence of the establishment of a fictitious market for the foreign like product if the movement in such prices appears to reduce the amount by which the normal value exceeds the export price (or the constructed export price) of the subject merchandise.

(3) Exportation from an intermediate country. Where the subject merchandise is exported to the United States from an intermediate country, normal value shall be determined in the intermediate country, except that normal value may be determined in the country of origin of the subject merchandise if—

(A) the producer knew at the time of the sale that the subject merchandise was destined for exportation;

(B) the subject merchandise is merely transshipped through the intermediate country;

(C) sales of the foreign like product in the intermediate country do not satisfy the conditions of paragraph (1)(C); or

(D) the foreign like product is not produced in the intermediate country.

(4) Use of constructed value. If the administering authority determines that the normal value of the subject merchandise cannot be determined under paragraph (1)(B)(i), then, notwithstanding paragraph (1)(B)(ii), the normal value of the subject merchandise may be the constructed value of that merchandise, as determined under subsection (e) of this section.

(5) Indirect sales or offers for sale. If the foreign like product is sold or, in the absence of sales, offered for sale through an affiliated party, the prices at which the foreign like product is sold (or offered for sale) by such affiliated party may be used in determining normal value.

(6) Adjustments. The price described in paragraph (1)(B) shall be—

(A) increased by the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the subject merchandise in condition packed ready for shipment to the United States;

(B) reduced by—

(i) when included in the price described in paragraph (1)(B), the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the foreign like product in condition packed ready for shipment to the place of delivery to the purchaser,

(ii) the amount, if any, included in the price described in paragraph (1)(B), attributable to any additional costs, charges, and expenses incident to bringing the foreign like product from the original place of shipment to the place of delivery to the purchaser, and

(iii) the amount of any taxes imposed directly upon the foreign like product or components thereof which have been rebated, or which have not been collected, on the subject merchandise, but only to the extent that such taxes are added to or included in the price of the foreign like product, and

(C) increased or decreased by the amount of any difference (or lack thereof) between the export price or constructed export price and the price described in paragraph (1)(B) (other than a difference for which allowance is otherwise provided under this section) that is established to the satisfaction of the administering authority to be wholly or partly due to—

(i) the fact that the quantities in which the subject merchandise is sold or agreed to be sold to the United States are greater than or less than the quantities in which the foreign like product is sold, agreed to be sold, or offered for sale,

(ii) the fact that merchandise described in subparagraph (B) or (C) of section 1677(16) of this title is used in determining normal value, or

(iii) other differences in the circumstances of sale.

(7) Additional adjustments.

(A) Level of trade. The price described in paragraph (1)(B) shall also be increased or decreased to make due allowance for any difference (or lack thereof) between the export price or constructed export price and the price described in paragraph (1)(B) (other than a difference for which allowance is otherwise made under this section) that is shown to be wholly or partly due to a difference in level of trade between the export

price or constructed export price and normal value, if the difference in level of trade—

(i) involves the performance of different selling activities; and

(ii) is demonstrated to affect price comparability, based on a pattern of consistent price differences between sales at different levels of trade in the country in which normal value is determined.

In a case described in the preceding sentence, the amount of the adjustment shall be based on the price differences between the two levels of trade in the country in which normal value is determined.

(B) Constructed export price offset. When normal value is established at a level of trade which constitutes a more advanced stage of distribution than the level of trade of the constructed export price, but the data available do not provide an appropriate basis to determine under subparagraph (A)(ii) a level of trade adjustment, normal value shall be reduced by the amount of indirect selling expenses incurred in the country in which normal value is determined on sales of the foreign like product but not more than the amount of such expenses for which a deduction is made under section 1766a(d)(1)(D) of this title.

(8) Adjustments to constructed value. Constructed value as determined under subsection (e) of this section, may be adjusted, as appropriate, pursuant to this subsection.

* * * *

(June 17, 1930, c. 497, Title VII, § 773, as added July 26, 1979, Pub.L. 96- 39, Title I, § 101, 93 Stat. 182, and amended Oct. 30, 1984, Pub.L. 98-573, Title VI, §§ 615, 620(b), 98 Stat. 3036, 3039; Oct. 22, 1986, Pub.L. 99- 514, Title XVIII, § 1886(a)(11), 100 Stat. 2922; Aug. 23, 1988, Pub.L. 100-

418, Title I, §§ 1316(a), 1318, 1319, 102 Stat. 1186, 1189; Dec. 8, 1994, Pub.L. 103-465, Title II, § 224, 108 Stat. 4878.)

**APPENDIX F**

**WORLD TRADE ORGANIZATION**

**WT/DS264/R**
13 April 2004
(04-1429)

Original: English

# UNITED STATES—FINAL DUMPING DETERMINATION ON SOFTWOOD LUMBER FROM CANADA (WT/DS264)

***Report of the Panel***

* * * *

## I. CLAIM 6: ARTICLES 2.4 AND 2.4.2—ZEROING

### (a) Factual Background

7.185 In the anti-dumping investigation underlying this dispute, DOC divided the product under investigation into groups of identical, or broadly similar, product types. After making certain adjustments within each product type, DOC calculated a weighted average normal value and export price for each product type, and then compared the weighted averages for each product type. This process resulted in multiple values, one for each product type. In some instances this comparison showed that the weighted average export price for a specific product type was less that the weighted average normal value, while in other instances, the comparison showed that the weighted average export price was greater than the weighted average normal value. These values were then aggregated to produce one single value, the margin of dumping for the product under investigation for each investigated exporter. In the aggregation process, a value of "zero" was attributed to those product comparisons where the weighted average export price was greater than the weighted average normal value. DOC then aggregated the positive values from the individual product type comparisons, that is, those instances where the weighted average export price was lower than the weighted normal value, and divided the result by the total value of exports, to arrive at a weighted average margin of dumping.

7.186 For ease of reference of the reader, but without giving any legal status to the concept, we will follow the approach of the parties by referring to those instances where the export price is greater than the normal value, as "negative dumping margins" or "negative dumping".[341] We will refer to the

---

[341] We note that there might be differences on how this methodology is applied by different investigating authorities. However, when we refer to

process of attributing a "zero" value to the individual product type comparisons where the weighted average export price is greater than the weighted average normal value for the same product type as "zeroing".

* * * *

(c) Evaluation by the Panel

7.196 The issue before the Panel is whether the methodology used by DOC in the underlying anti-dumping investigation whereby it attributed a value of zero to those instances where the weighted average export price was greater than the weighted average normal value when aggregating the different values determined for the different product types to compute the overall margin of dumping, is consistent with the obligations imposed by Article 2.4.2 and the "fair comparison" requirement in Article 2.4 of the *AD Agreement*.[343, 344]

---

the term "zeroing", we refer to the methodology as applied by the DOC in the underlying anti-dumping investigation as described by DOC in Exhibit CDA-2, IDM, pp. 65-66.

[343] We note that, in the IDM, DOC justified its use of the methodology at issue by referring to Sections 771(35)(A) and 771(35)(B) of the US Tariff Act as follows:

> "[t]hese sections, taken together, direct [DOC] to aggregate all individual dumping margins, each of which is determined by the amount by which normal value exceeds export price or constructed export price, and to divide this amount by the value of all sales. The directive to determine the "aggregate dumping margins" in section 771(35)(B) makes clear that the singular "dumping margin" in section 771(35)(A) applies on a comparison-specific level, and does not apply on an aggregate basis". (Exhibit CDA-2, IDM, Comment 12, p. 66)

We do not understand Canada to challenge the above-referred sections of the US statute but DOC's application of zeroing when determining the overall margin of dumping for the Canadian exporters involved in the softwood lumber investigation. For this reason, we do not examine the consistency of Sections 771(35)(A) and 771(35)(B) with relevant provisions of the AD Agreement.

7.197 Article 2.4.2 of the *AD Agreement* provides in relevant part as follows:

> "[s]ubject to the provisions governing fair comparison in [Article 2.4], the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison."

7.198 Article 2.4 provides in relevant part that:

> "[a] fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability."

---

[344] We do not understand Canada to dispute that DOC was entitled to make adjustments within each product type to ensure an "apples-to-apples" comparison within that product type, calculate a weighted average normal value and a weighted average export price for each product type, and compare the two.

7.199 Article 2.4 of the *AD Agreement* provides that a fair comparison shall be made between export price and normal value, and sets out specific parameters for how such comparisons are to be made. The two sub-paragraphs of Article 2.4 deal with specific aspects of the comparison of normal value and export price. Article 2.4.1—which is not at issue in this dispute—provides rules for the conversion of currencies, when such conversion is necessary for the purposes of a comparison under Article 2.4. Article 2.4.2 establishes that, subject to the requirement of a fair comparison, dumping margins should normally be established on the basis of a comparison between a weighted average export price to a weighted average normal value, or on the basis of a transaction-to-transaction comparison. A comparison between a weighted average normal value to individual export transactions is allowed only in limited circumstances.

7.200 The issue before us is whether zeroing is allowed when an investigating authority is calculating an overall margin of dumping under the first—weighted average-to-weighted average—methodology set forth in Article 2.4.2. We note that, in practice, the issue of zeroing arises in the context of the weighted average-to-weighted average methodology only where the investigating authority engages in so-called "multiple averaging", that is, where it sub-divides the product under investigation into groups and performs a weighted average-to-weighted average comparison for each group. Specifically, the issue of zeroing arises in the context of aggregating the results of these multiple comparisons into an overall margin for each exporter/producer for the product under investigation. Where only a single weighted average-to-weighted average comparison is performed, it seems to us that the issue of zeroing *per se* could not arise (although there might still be issues about the manner in which the averaging was performed).

7.201 In this case, DOC engaged in multiple averaging on the basis of differing physical characteristics of the product under investigation. As mentioned in paragraph 7.159, *supra*, DOC identified eleven physical characteristics and, with some exceptions, performed weighted average-to-weighted average comparisons only on the basis of transactions involving merchandise which shared these physical characteristics (this could be characterized as multiple averaging based on product type or model). Although multiple averaging based on different types or models may be particularly common, multiple averaging may also be used in other contexts. For example, an investigating authority might perform multiple averaging in respect of sales made at different levels of trade (e.g., retail versus wholesale) or on the basis of sub-periods of the period of investigation[345] (the latter may arise in cases where hyper-inflationary economies are involved). Thus, an investigating authority might well resort to multiple averaging to ensure comparability even in a case of absolute product homogeneity, i.e., where all of the product under investigation is identical and is being compared to transactions involving identical goods in the market of the exporting country.

7.202 There is no dispute between the parties as to the appropriateness or consistency with the *AD Agreement* of this multiple averaging approach to calculating dumping margins *per se*. To the contrary, Canada acknowledges that multiple averaging is permissible.[346] However, in light of the fact that multiple averaging is a prerequisite for the issue of zeroing to arise in the context of applying the weighted average-to-weighted average methodology, and taking into account the arguments of the parties and the reasoning developed by the Appellate Body in *EC—Bed Linen*[347], we consider that we

---

[345] Panel Report, *US—Stainless Steel*, paras. 6.105-6.136.

[346] Canada response to question 30 of the Panel, para. 106 and Canada second written submission, para. 143.

[347] Appellate Body Report, *EC—Bed Linen*, paras. 46-66.

must examine the issue of multiple averaging if we are to arrive at reasoned conclusions regarding the question of zeroing in the context of a weighted average-to-weighted average comparison methodology.

7.203 We begin our analysis with Article 2.4.2, which provides that the existence of margins of dumping shall normally be established "on the basis of a comparison of a weighted average normal value with a weighted average of *all comparable* export transactions". (emphasis added) The word "comparable", in its ordinary meaning, indicates that a weighted average normal value is not to be compared to a weighted average export price that includes non-comparable export transactions, but only to comparable export transactions. Further, we are required as treaty interpreters to assume that when the drafters included language in the treaty, that they intended that language to have some meaning.[348] If the drafters had intended to require that the existence of a dumping margin for a product always be calculated by comparing a single weighted average normal value and a single weighted average of prices of all export transactions, we do not believe that they would have included the word "comparable" in Article 2.4.2, as that word would serve no purpose in the text. The fact that the word "comparable" was added to the text of Article 2.4.2 towards the end of the negotiating process, confirms our view that it was included for a purpose and should not simply be disregarded as surplus verbiage.[349]

---

[348] *See, e.g.*, Appellate Body Report, *US—Gasoline*, p. 23 where it is stated that:

> ". . . [o]ne of the corollaries of the 'general principle of interpretation' in the Vienna Convention is that interpretation must give meaning and effect to all the terms of the treaty".

[349] The insertion of the word "comparable" into Article 2.4.2 represented the only modification to the draft text of the Article between the date of the Draft Final Act and the text as adopted at the conclusion of the Uruguay Round, reflecting the current Article 2.4.2. (*See Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade*

7.204 We are as treaty interpreters of course required to give meaning to all the terms of a treaty, and we must therefore arrive at an interpretation of Article 2.4.2 that gives meaning both to the words "all" *and* "comparable". In our view, however, there is no need to choose between the two terms. Rather, the phrase "all comparable export transactions" would in its ordinary meaning appear to signify that Members may only compare those export transactions which are comparable, but that it must compare *all* such transactions. Thus, the term "all" plays an important role in the provision by ensuring that Members do not exclude relevant transactions from their comparisons.

7.205 We note that a number of panels have expressed the view that multiple averaging is permitted by Article 2.4.2. The issue has been considered by both the *US—Stainless Steel* and *Argentina—Ceramic Tiles* panels. Both panels concluded that multiple averaging was permitted by Article 2.4.2 in appropriate circumstances.[350]

---

*Negotiations,* MTN.TNC/W/FA, 20 December 1991) We agree with the panel in *US—Stainless Steel* that this suggests that its inclusion was not merely incidental but reflected careful consideration by the drafters. (Panel Report, *US—Stainless Steel,* para. 6.111, note 114)

[350] Panel Report, *US—Stainless Steel,* para. 6.111, where it is stated that:

> "[t]he inclusion of the word "comparable" is in our view highly significant, as in its ordinary meaning it indicates that a weighted average normal value is not to be compared to a weighted average export price that includes non-comparable export transactions. It flows from this conclusion that a Member is not required to compare a single weighted average normal value to a single weighted average export price in cases where certain export transactions are not comparable to transactions that represent the basis for the calculation of the normal value". (footnote omitted)

*See* also Panel Report, *Argentina—Ceramic Tiles,* para. 6.99, where it is stated that:

> "[w]e consider that the use of types or models is a valid method of ensuring a fair comparison between normal value and export price under Article 2.4".

7.206 We do not consider that, by definition, "all types or models falling within the scope of a 'like' product must necessarily be comparable"[351], nor more generally that all export transactions of the product under investigation will necessarily be comparable to the home market sales against which a comparison is to be made. Leaving aside the issue of the meaning of likeness, the fact that Article 2.4 explicitly provides for due allowances to be made for differences that affect price comparability means to us that, in the absence of such adjustments, certain transactions may not be comparable. In other words, the very reason due allowance may be necessary is precisely because the transactions might not otherwise be comparable. This lack of comparability could be due to differences in physical characteristics—a basis for allowance that is specifically identified in Article 2.4—but Article 2.4 tells us that non-comparability could also arise from differences in conditions and terms of sale, levels of trade, quantities and other unspecified differences.[352] Thus, we do not believe that the significance of the reference to "comparable" export prices can simply be discounted on the grounds that the products/transactions must "necessarily be comparable".[353]

7.207 Of course, one way to ensure comparability is to make due allowance for certain differences, but given the inclusion of the term "comparable" in Article 2.4.2 we are not convinced that this method, however important, is the exclusive means allowed by the *AD Agreement* to ensure comparability. Nor, from a practical perspective, do we

---

[351] Appellate Body Report, *EC—Bed Linen*, para. 58.

[352] We are also of the view that the authorization in Article 6.10 of the *AD Agreement* to use certain sampling techniques where "the number of (. . .) types of products" is too large, confirms our interpretation that there may be differences in physical characteristics between products being compared, and should dispel those doubts entirely.

[353] Appellate Body Report, *EC—Bed Linen*, para. 58.

believe that such an approach would be desirable. In theory, of course, any difference between products/transactions can be accounted for by adjustments. In many cases, however, it may be difficult to determine whether a difference affects price comparability such that an adjustment is required, much less to establish the amount of the adjustment that would be appropriate. While some differences, such as differences in taxation, may be easy to quantify and adjust for, adjustments for differences in physical characteristics may be complex and highly uncertain, depending upon the number and extent of the differences in physical characteristics, and the extent to which those reflect differences in costs of production. The issue of whether or not DOC should have made due allowance for differences in dimension, addressed elsewhere in this Report, is a demonstration of how complex adjustment questions may be. The quantification of other types of adjustments, such as for differences in level of trade, may be even more problematic. It is therefore not surprising that many investigating authorities—and respondent exporters—prefer to limit to the extent possible the need for such adjustments by performing their comparisons on the basis of groups of transactions sharing common characteristics. Thus, we consider that the use of multiple averaging is consistent with the overall objective of Article 2.4, which is to ensure a fair comparison when comparing export price to normal value.

7.208 We find further support for our view from the fact that Article 2.4.2 allows dumping margins to be calculated on the basis either of weighted-average-to-weighted-average or transaction-to-transaction comparisons. When an investigating authority uses a transaction-to-transaction methodology, it is in a position to select the most similar products/transactions possible for comparison, and may therefore be able to minimize the extent of the adjustments that need to be made. We consider it unlikely that the drafters would have agreed to allow comparisons only at the most aggregated

level (a single weighted-average-to-weighted-average comparison) or the most disaggregated level (transaction-to-transaction) while disallowing the intermediate approach of multiple averaging. Rather, it seems more likely to us that the intention of the drafters in specifying that Members shall normally be restricted to a weighted-average-to-weighted-average or transaction-to-transaction approach was to make clear that a weighted-average-to-transaction approach—a methodology that was widely used before the current *AD Agreement* came into effect—was only permitted in the limited circumstances specified in the second sentence of Article 2.4.2.

7.209 We are, of course, aware that Article 2.4.2 provides for the establishment of the existence of margins of dumping on the basis of *a* comparison of a weighted-average-normal-value with a weighted average of prices of all comparable export transactions, i.e., that the reference to "a" comparison is in the singular rather than in the plural. We note however that the second methodology (transaction-to-transaction) also refers to "*a* comparison of normal value to export prices on a transaction by transaction basis", yet the subsequent reference to export prices makes clear that in such a methodology investigating authorities are not restricted to establishing dumping margins by comparing one single normal value transaction to a single export price, but by definition will, in any case in which there is more than one transaction, be performing multiple comparisons of individual transactions. As for the reference to "*a* weighted average normal value", this use of the singular may be understood to mean that each group of "comparable" export transactions is to be compared to a single weighted-average-normal-value.

7.210 Our analysis of multiple averaging does not rely upon the reference in Article 2.4.2 to the establishment of "margins of dumping". Although it could be argued that this phrase is in the plural precisely because multiple averaging produces a dumping margin for each category of product/transaction

compared, it could just as well be the case that it is in the plural because in many cases there will be multiple exporters or producers. We consider however that, assuming that the reference to "margins of dumping" means the margin of dumping for the product under investigation as a whole[354], our analysis above supports the conclusion that multiple averaging is nevertheless not prohibited by Article 2.4.2. In particular, while it may well be that the reference to "margins of dumping" is a reference to the overall margin for the exports of the product under investigation, this would mean simply that Article 2.4.2 provides guidance with respect to the methodologies used for determining the existence of such margins.[355] It would not, in our view, compel the conclusion that such overall margins could not be derived on the basis of multiple averaging.

7.211 In light of our analysis above, we conclude, and agree with the parties to this dispute, that the use of multiple averaging is not prohibited by the *AD Agreement*.

7.212 Having found that multiple averaging, *per se*, is not prohibited by the *AD Agreement*, we next consider whether the methodology applied by DOC in this case when aggregating the values generated from multiple averaging, in

---

[354] As the Appellate Body concluded in para. 53 of its Report in *EC—Bed Linen*.

[355] We note further that Article 2.4.2 requires that the "existence of margins of dumping during the investigation phase shall normally be established *on the basis of* a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions. . . ". (emphasis added) We note that the ordinary meaning of the word "basis" is "the underlying support for a process". (*The Concise Oxford Dictionary of Current English* (Clarendon Press, 1995), p. 113) This suggests to us that, while the determination of the existence of margins of dumping must be based on weighted average-to-weighted average comparisons, Article 2.4.2 was not intended to spell out in detail all elements of that calculation.

which "negative dumping" was attributed a zero value, is inconsistent with Article 2.4.2.

7.213 Bearing in mind our conclusion in paragraph 7.211, *supra*, regarding multiple averaging, we will now consider the obligations of an investigating authority when calculating a weighted-average-normal-value and a weighted-average-export-price in accordance with Article 2.4.2 of the *AD Agreement* when the product under investigation is divided into sub-categories based on types or models, levels of trade or other differences. The question of zeroing arises in the process of aggregating the weighted averages for the different types or models, levels of trade or other differences, into a single, overall margin of dumping. With regard to this process, parties express diverging views as to whether Article 2.4.2 applies to the determination and comparison of weighted average normal values and weighted average export prices only for each of the types or models (the so-called "first stage")—as the United States argues—or whether it also applies to the aggregation of the results for each of the comparisons made (the so-called "second-stage")—as Canada argues.[356] Thus, the United States asserts that the text "all comparable export transactions" in Article 2.4.2 is—because of the insertion of the word "comparable"—applicable only to the first stage of the calculation process. The United States argues that Article 2.4.2 does not apply to the second stage in the calculation process; thereby not disallowing the use of zeroing by an investigating authority. Canada does not dispute that there are two stages, as asserted by the United States. However, it disagrees with the US argument that Article 2.4.2 does not discipline the second stage.

7.214 In our examination of this question, we keep in mind the Appellate Body's findings with regard to the issue of whether Article 2.4.2 contemplates whether the calculation of

---

[356] The two "stages" are described by the United States in its response to question 109 of the Panel, para. 52.

the margin of dumping, as envisaged in Article 2.4.2, can be *divided into two distinct stages*[357], as well as the parties' submissions on this issue. In our view, whether Article 2.4.2 contemplates one or two stages in the calculation of the overall margin of dumping and whether the term "comparable" in "all *comparable* export transactions" relates only to the first stage or to both—in case there were two stages—are related questions. We note that the calculation of the margin of dumping is a process which starts with the determination of the normal value, and it continues with the establishment of the export price. Both prices are subsequently adjusted in order to ensure a "fair comparison", as required by Article 2.4. Finally, these two values—normal value and export price—are compared, for the purpose of computing the overall margin of dumping. Thus, in our view, a determination of the margin of dumping in an anti-dumping investigation could be sub-divided into a whole range of steps or stages, forming a coherent process. At issue are the last two steps in this process of calculating the overall margin of dumping. We do not consider that the question before us is whether there are several steps or stages contemplated in Article 2.4.2 and, if this is the case, whether the obligation imposed by Article 2.4.2 with respect to the calculation of the margin of dumping under the weighted-average-to-weighted-average methodology applies to the first stage only because of the term "comparable" in "all *comparable* export transactions". Rather, we are of the view that the question before us is whether an investigating authority is allowed to partially exclude from the aggregation process those results of comparing types or models for which the weighted-average-normal-value was determined to be less than the weighted-average-export-price in the aggregation process.

7.215 It is clear that Article 2.4.2 requires that all comparable export transactions have to be taken into account

---

[357] Appellate Body Report, *EC—Bed Linen*, para. 53.

when the weighted average normal value is compared to the weighted average of prices of *all comparable* export transactions. We note that this interpretation of the requirement of Article 2.4.2 is the same as that of the Appellate Body in *EC—Bed Linen*.[358]

7.216 Through the use of zeroing, it is clear to us that the entirety of the prices of some export transactions, i.e., those export transactions where the weighted-average-export-price is greater than the weighted-average-normal-value, in the second stage of the process, are not taken into account.[359] Recalling our view that the calculation of the margin of dumping is a continuous process, we fail to understand why

---

[358] *Id.*, para. 55.

[359] The panel in *EC—Bed Linen* explained how zeroing affects prices of the export transactions to which is applied:

> "[b]y counting as zero the results of comparisons showing a "negative" margin, the European Communities, in effect, changed the prices of the export transactions in those comparisons. It is, in our view, impermissible to "zero" such "negative" margins in establishing the existence of dumping for the product under investigation, since this has the effect of changing the results of an otherwise proper comparison. This effect arises because the zeroing effectively counts the weighted average export price to be equal to the weighted average normal value for those models for which "negative" margins were found in the comparison, despite the fact that it was, in reality, higher than the weighted average normal value. This is the equivalent of manipulating the individual export prices counted in calculating the weighted average, in order to arrive at a weighted average equal to the weighted average normal value. As a result, we consider that an overall dumping margin calculated on the basis of zeroing "negative" margins determined for some models is not based on comparisons which fully reflect all comparable export prices, and is therefore calculated inconsistently with the requirements of Article 2.4.2". (Panel Report, *EC – Bed Linen*, para. 6.115)

We agree with the above explanation of how zeroing manipulates the outcome of what should be a determination of dumping which, up to the point of aggregation of the margins of dumping, is consistent with Articles 2.2, 2.2.1, 2.2.1.1, 2.2.2, 2.3, 2.4 and 2.4.1 of the *AD Agreement*.

the negotiators of the *AD Agreement* would have included an obligation in the provisions of the *AD Agreement* (the term "all" in "all comparable export transactions"), if, in the very next step of the calculation process—through zeroing—investigating authorities were to be allowed to ignore this very same obligation (certain values which they were obligated to take into account in the first stage of the process). In other words, we do not interpret the requirement of Article 2.4.2 to bear only on the first stage of the process, but rather view that obligation as applying to the process as a whole. We are of the view that, if the drafters had intended that Article 2.4.2 applies only to the first stage of the process, they would have made this clear. The United States has not advanced any argument explaining why an interpretation that Article 2.4.2 is applicable to the pre-aggregation stage should be accepted by us, apart from the argument that the *AD Agreement* does not contain any requirements as to the second stage of the process. We find this argumentation of the United States not convincing.

7.217 Considering the requirement of Article 2.4.2 that the existence of margins of dumping has to be established for softwood lumber on the basis of a comparison of the weighted-average-normal-value with the weighted average of prices of all comparable export transactions, that is, for all transactions involving all types of the product under investigation, we are of the view that the United States did not take into account all comparable export transactions when DOC calculated the overall margin of dumping in the investigation at issue.

7.218 The United States also argues that:

> "[t]hus, interpreting the language of the first methodology [average-to-average] as requiring authorities to offset dumping margins implies that the negotiators addressed the offset issue with respect to that methodology, but not the other two [transaction-to-transaction and average normal value-to-individual

> transaction export price], leaving the issue to the Members' discretion when utilizing either of the other two methodologies. Canada offers no interpretation of Article 2.4.2 that justifies such an anomalous result, nor does it offer any explanation as to why the negotiators might have intended to create such an anomaly."[360]

7.219 We note that Canada has not raised any claim with regard to DOC's use of "the other two methodologies". Thus, it is not within the Panel's terms of reference to rule on whether zeroing can, or cannot, be used when determining the overall margin of dumping under the other comparison methodologies set forth in Article 2.4.2, i.e., transaction-to-transaction and weighted average normal value-to-individual transaction export price.[361]

7.220 Finally, the United States asserts that the negotiating history of the *AD Agreement* confirms that the calculation of the margin of dumping using zeroing is consistent with Articles 2.4 and 2.4.2. Canada disagrees.

7.221 We note that Article 32 of the *Vienna Convention* provides that:

---

[360] US first written submission, paras. 158-159.

[361] Although we are mindful that we are not called upon to decide whether zeroing is allowed or disallowed under the transaction-to-transaction and weighted-average-normal-value to individual export transaction methodologies, we are of the view that the use of zeroing when determining a margin of dumping based on the transaction-to-transaction methodology would not be in conformity with Article 2.4.2 of the *AD Agreement*. As for the use of zeroing when determining a margin of dumping based on the third (weighted average-to-individual) methodology, we note that this methodology is exceptional in nature and can only be used in specific defined situations. Without intending to express any view as to the permissibility of zeroing when this third methodology is used, we do not agree with the United States that it would be an "anomaly" if zeroing were prohibited in the case of average-to-average comparisons but not in the exceptional case of weighted average-to-individual comparisons.

"*Supplementary means of interpretation*

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or
(b) leads to a result which is manifestly absurd or unreasonable."

7.222 We also note that the Appellate Body has consistently found that:

> "[a] treaty interpreter must begin with, and focus upon, the text of the particular provision to be interpreted. It is in the words constituting that provision, read in their context, that the object and purpose of the states parties to the treaty must first be sought. Where the meaning imparted by the text itself is equivocal or inconclusive, or where confirmation of the correctness of the reading of the text itself is desired, light from the object and purpose of the treaty as a whole may usefully be sought."[362]

7.223 As we consider that the meaning imparted by the text of Article 2.4.2 of the *AD Agreement* itself, is neither

---

[362] Appellate Body Report, *US—Shrimp*, para. 114. *See* also Appellate Body Report, *US—Carbon Steel*, paras. 61-62, where it is stated that:

> ". . . we recall that Article 3.2 of the DSU recognizes that interpretative issues arising in WTO dispute settlement are to be resolved through the application of customary rules of interpretation of public international law. It is well settled in WTO case law that the principles codified in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* (the "*Vienna Convention*") are such customary rules.
>
> . . . the task of interpreting a treaty provision *must begin with its specific terms*". (emphasis added)

equivocal nor inconclusive as to whether zeroing is inconsistent with Article 2.4.2 of the *AD Agreement*, we do not deem it necessary in the case before us to have recourse to the negotiating history in order to confirm the correctness of our reading of the text of that provision.

7.224 We therefore find that the United States has violated Article 2.4.2 of the *AD Agreement* by not taking into account all comparable export transactions when DOC calculated the overall margin of dumping as Article 2.4.2 requires that the existence of margins of dumping has to be established for softwood lumber on the basis of a comparison of the weighted-average-normal-value with the weighted average of prices of all comparable export transactions, that is, for all transactions involving all types of the product under investigation.

7.225 Canada raises a separate claim of violation of Article 2.4 of the *AD Agreement*. In support of its claim, Canada argues that "[a] "fair comparison" requires equitable, unbiased treatment of all transactions being compared. Zeroing does not produce a fair comparison because it arbitrarily eliminates certain transactions from the calculation, resulting in a margin that does not equally reflect all transactions".[363] The United States disagrees.[364]

7.226 Having found in paragraph 7.224, *supra,* that the methodology applied by DOC when calculating the overall margin of dumping in the investigation on certain softwood lumber products from Canada is inconsistent with Article 2.4.2 of the *AD Agreement,* we consider that it is neither appropriate, nor necessary for us to rule on Canada's Article 2.4 claim.

* * * *

---

[363] Canada response to question 108 (b) of the Panel, paras. 59-61.

[364] US comments on Canada's responses to question 104 of the Panel, para. 7.

## IX. DISSENTING OPINION BY ONE MEMBER OF THE PANEL REGARDING CANADA'S CLAIM ON ZEROING

9.1 Although I join my colleagues on this Panel with respect to the findings on all other claims before us, I must respectfully disagree with the findings regarding zeroing (Claim 6). In my view, Canada has not established that zeroing is inconsistent either with the specific provisions of Article 2.4.2 or with the general "fair comparison" requirement of Article 2.4. At a minimum, I consider that the United States' interpretation of Articles 2.4.2 and 2.4 as not prohibiting zeroing is a permissible one. Accordingly, I would find that the United States did not act inconsistently with Articles 2.4.2 and 2.4 by reason of the zeroing of negative margins in the investigation underlying this dispute.

9.2 At the outset, I recall the standard of review that governs the work of panels (and the Appellate Body) when examining claims that a Member has violated the *AD Agreement*. Article 17.6(ii) provides that, where a provision of the *AD Agreement* admits of more than one permissible interpretation, a measure shall be found to be in conformity with that provision if it rests upon one of those permissible interpretations. Thus, our task is not to choose our preferred interpretation of Articles 2.4.2 and 2.4 of the *AD Agreement*, but to determine whether the interpretation advanced by the United States is permissible, under the rules of treaty interpretation applicable in WTO dispute settlement. Should we so find, then we must rule that the United States' actions in zeroing in this investigation are in conformity with Articles 2.4.2 and 2.4. In my view, Article 17.6(ii) applies at every step of our analysis: if any essential step in our reasoning depends upon an interpretation which is only one of multiple permissible ones, then we cannot find that the United States has acted inconsistently with the *AD Agreement*.

9.3 Although I disagree with my colleagues' findings on zeroing, I agree with their intermediate conclusion that multiple averaging is permitted by Article 2.4.2 of the *AD Agreement*. In my view, this is not a question of multiple permissible interpretations, but rather of the correct interpretation of that provision. My colleagues have fully explained the bases for their conclusions on multiple averaging, including the need to give meaning to the word "comparable", particularly given its inclusion in the text at a late stage in the negotiations; the appropriateness of reading the phrase "all comparable export transactions" as a whole in a manner which gives meaning to all elements; the relevance of the concept of "price comparability" in respect of Article 2.4 adjustments as context for understanding the term "comparable" in Article 2.4.2; the obvious illogic of interpreting Article 2.4.2 to require that comparisons be made either at the most aggregated (average to average) or least aggregated (individual to individual) level, while prohibiting comparisons at intermediate levels of aggregation[502]; and the consistency of multiple averaging with the overall objective of Article 2.4, which is to ensure a fair comparison. I would only add that the use of the term "margin*s* of dumping", although not conclusive as to whether multiple averaging is allowed, represents an additional element in the overall picture supporting the conclusion that multiple averaging is permitted.

9.4 While I see no need to repeat my colleagues' reasoning, I would like to emphasize the critical importance of multiple averaging in insuring a fair comparison. There will be differences between home market and export transactions in virtually all anti-dumping investigations.

---

[502] It is difficult to understand why an investigating authority would be required either to compare the entire product under investigation to the entire foreign like product or individual export transactions to individual home market transaction, while not being allowed to compare groups of export transactions to groups of comparable home market transactions.

These differences may arise from, *inter alia*, physical differences, differences in level of trade, or date of sale.[503] While these differences may in principle be taken into account through adjustments, in many cases it simply will not be possible to identify and quantify their precise effects on price comparability. Further, there are a variety of different ways to get at the issue of price comparability and the making of adjustments. In the case of a wide variety of types or dates of sale, for example, even identifying which of the many groups should represent the standard towards which adjustments should aim will be unclear. Multiple averaging eliminates the need to consider such adjustments, thus reducing the influence of subjective judgment on outcomes. In my view, therefore, multiple averaging not only is not prohibited by the *AD Agreement*, but it is generally the most appropriate, fairest, most precise, most predictable, and in many cases the only possible way to insure a fair comparison.[504] We have to assume that the negotiators were aware of this as they negotiated the *AD Agreement*.

9.5 The reader may ask why it is necessary in this Report to discuss the permissibility of multiple averaging. After all, the parties agree that multiple averaging is permissible under

---

[503] For purely practical reasons it can be excluded that the need for multiple averaging in the case of multiple models or types can be eliminated by conducting separate investigations for every model or type, since even a product under investigation which is defined in a seemingly narrow fashion, such as television sets or ball bearings of a specific dimension, may involve innumerable models or types.

[504] At the second meeting of the Panel with the parties, we asked representatives of both parties how often they had come across a case where there was only one step to do, i.e. where there was only one model, one level of trade and one period. The US representative responded that he was unaware of any investigation that fit that description, while the Canadian representative stated that he had experienced "one or two" single-stage cases.

Article 2.4.2[505], and the third parties have not contended otherwise.[506] The reason the discussion is relevant here is that Canada relies upon the Appellate Body ruling on zeroing in *EC—Bed Linen* in this dispute, and in my view that ruling is predicated, at least implicitly, on the conclusion that multiple averaging is prohibited by Article 2.4.2.[507] The Appellate Body's reasoning, which seems ultimately to be based on the view that by zeroing the EC calculated a weighted average that did not fully reflect the prices of some export transactions and thus fell afoul of the requirement to compare a weighted average normal value with a weighted average of all comparable export transactions, simply cannot be squared with a finding that multiple averaging is permitted. Thus, if multiple averaging *is* permitted—and the parties, my colleagues and I all agree that it is—one cannot simply rely upon the Appellate Body Report in *EC—Bed Linen* to conclude that zeroing is prohibited. Rather, we must consider whether there is some *alternative* basis to conclude that zeroing is prohibited by Article 2.4.2.

9.6 My colleagues have attempted to develop such an alternative to the reasoning found in *EC—Bed Linen*. They have concluded that the obligation to include in the weighted

---

[505] Canada argued before the Panel that its interpretation of Article 2.4.2 ". . . does not prohibit the establishment of margins of dumping with respect to particular models of a product." Canada response to question 31 from the Panel, para. 109.

[506] Japan noted that "[a] multiple comparison method provided in Article 2.4.2 may be used in the margin calculation process as a matter of administrative convenience to take into account the differences in physical characteristics among several models of a product." (Japan's third party oral statement, para. 5.75, *supra*)

[507] Thus, the Appellate Body stated that "[a]ll types or models falling within the scope of a "like" product must necessarily be "comparable", and export transactions involving those types or models must therefore be considered "comparable export transactions" within the meaning of Article 2.4.2." (Appellate Body Report, *EC—Bed Linen*, para. 58)

average export price "all comparable export transactions" applies not only to the comparison stage but *also* to the aggregation of the results of multiple comparisons. They consider that through zeroing the United States partially excluded from the aggregation process the results of comparisons for types for which the weighted average normal value was less than the weighted average export price. They conclude that the United States therefore violated Article 2.4.2 by not taking into account all comparable export prices when calculating the overall margin of dumping. I must respectfully disagree.

9.7 It will be recalled that, when an investigating authority engages in multiple averaging, it first divides the subject merchandise (and the foreign like product) into groups based upon common characteristics (which may relate to physical characteristics, level of trade, date of sale, etc). It calculates a weighted average normal value and export price for each group, and then compares the weighted averages in order to determine the extent of the dumping, if any, for that group. The result will be multiple margins of dumping (or amounts of dumping, if one prefers), one for each group. In order to determine an overall margin for the product under investigation, however, it will be necessary in some way to aggregate the results from the comparisons for each group. An analogous process will be involved where an investigating authority performs its calculations on a transaction-to-transaction basis. In that case as well, the investigating authority will derive margins (or amounts) of dumping for a number of specific transactions, and will then have to aggregate those margins in order to determine an overall margin of dumping for the product.

9.8 There is no doubt that, as the investigating authority in the case of multiple averaging is calculating weight-averaged normal values and export prices for each group, it is required in the investigation phase to respect Article 2.4.2. This includes the obligation under Article 2.4.2 to include in each

of the average-to-average comparisons "all comparable export transactions". In this case, however, there is no suggestion that DOC has failed to include any comparable export transactions in any of the average to average comparisons DOC made in this case. Nor is there any indication that DOC failed to *fully* take into account any export transaction in the conduct of each average to average comparison. Based on the record before us, it must be considered that each and every one of the export transactions considered by DOC was fully taken into account when performing the comparison between normal value and export price for a given type. Rather, the claim of Canada, and the reasoning of my colleagues on this Panel, is based upon the view that the United States breached the obligation to include "all comparable export transactions" as a result of the manner in which the United States aggregated the results of its multiple comparisons.

9.9 It seems to me that my colleagues are trying to reconcile two mutually incompatible positions. They conclude that Article 2.4.2 does not require that the overall margin of dumping for a product be calculated on the basis of a single weighted average export price and single weighted average normal value. At the same time, they seem to conclude that the ultimate result of the aggregation of multiple average to average comparisons must be the same as if DOC had conducted a single average to average comparison, or in any event that once it has performed multiple averages DOC is required to average those averages, using negative dumping margins to offset positive margins. In my view, these conclusions are unconvincing. Article 2.4.2 allows multiple averaging, and the obligations of Article 2.4.2 relate to each of the average to average comparisons performed. This is all the guidance that can be determined from the text of Article 2.4.2. I can see nothing in Article 2.4.2 that specifically dictates how those "intermediate" margins are to be aggregated in order to calculate an overall margin of dumping for the investigated product for a given

exporter, any more than I can see anything in Article 2.4.2 that prescribes how the results of transaction-by-transaction comparisons are aggregated.

9.10 In this respect, it is noteworthy that the *AD Agreement* is silent as to aggregation not only with respect to the first (average-to-average) comparison methodology. I note as a matter of relevant context that Article 2.4.2 is equally silent as to how to aggregate the results of transaction-by-transaction comparisons under the second methodology set forth in that provision. Article 2.4.2 provides that the existence of margins of dumping may be established "by a comparison of normal value and export prices on a transaction by transaction basis". Clearly, nothing in Article 2.4.2 gives specific guidance on how the results of individual transaction comparisons are to be aggregated, and the textual basis relied on by my colleagues for prohibiting zeroing when aggregating the results of multiple average-to-average comparisons ("all comparable export transactions") on its face does not apply to the transaction-by-transaction methodology. It is therefore clear that Article 2.4.2 does not prohibit zeroing in the context of the transaction-by-transaction methodology.[508] It would be very odd indeed for the drafters to have prohibited zeroing when aggregating the results of multiple average to average comparisons, while allowing it to be used when aggregating the results of comparisons performed on a transaction by transaction basis.[509]

---

[508] Nor, for the reasons set forth in paras. 9.14 to 9.24 *infra*, would zeroing be prohibited under a general "fair comparison" requirement under Article 2.4.

[509] My colleagues decline to address the issue of zeroing in the context of individual to individual transactions on the grounds that it is not within the Panel's terms of reference. While it is certainly true that no such claim is before us, I believe that the language in Article 2.4.2 regarding transaction to transaction comparisons is highly relevant context for interpreting other parts of Article 2.4.2.

9.11 The use of multiple averaging must have been widely known to negotiators, as the practice was the norm under the *Tokyo Round Anti-Dumping Code*. The negotiators should also have been fully aware of the zeroing issue.[510] They certainly should have realized that simply requiring average-to-average or transaction-by-transaction comparisons would not resolve the issue of aggregation in the subsequent stage. But if the drafters did not intend to prohibit zeroing, then what is the purpose of Article 2.4.2? In my view, Article 2.4.2 was intended to address a related but distinct issue from that of zeroing, i.e., the question of average to individual comparisons. Prior to the Uruguay Round, many investigating authorities compared individual export transactions to an average normal value. On its face, the purpose of Article 2.4.2 seems to be to require that, except in specified situations, there be symmetry in the comparisons made by investigating authorities, i.e., that Members *either* compare on an average to average *or* a transaction to transaction basis. Only where particular conditions are met may a Member perform a comparison of prices of individual export transactions to an average normal value.

9.12 I recall that, under Article 17.6(ii) of the *AD Agreement*, a panel may not find a measure to be inconsistent with a provision of the *AD Agreement* if that measure is based on a permissible interpretation of that provision. In this case, I consider that the US interpretation of Article 2.4.2 as not prohibiting zeroing is a permissible one. Thus, for the reasons set forth above, I would find that the application by DOC of

---

[510] In fact, the EC and Japan were involved in a high-profile dispute with respect to zeroing throughout the later stages of the anti-dumping negotiations, beginning with a request for consultations on 8 July 1991 and culminating in the circulation of a Panel Report in *EC—Audio Cassettes*. (Panel Report, *EC—Anti-Dumping Duties on Audio Tapes in Cassettes Originating in Japan*, 28 April 1995, ADP/136.) This Report was never adopted.

"zeroing" in this case was not inconsistent with Article 2.4.2 of the *AD Agreement*.

9.13 Some may be troubled by the prospect that no specific rules exist regarding the manner in which the results of multiple average to average (and transaction-by-transaction) comparisons may be aggregated. The general provision of Article 2.4 is however still available, as discussed infra. In any event, the establishment of an anti-dumping margin is a highly complex exercise. Although Article 2 of the current *AD Agreement* is more detailed that its Tokyo Round predecessor, many aspects of margin calculation are not specifically addressed. If Members consider that the issue of how to aggregate the results of multiple comparisons is a lacuna that needs to be filled, then they should negotiate such rules in the appropriate forum. Dispute settlement involves the interpretation of rules agreed by Members. It cannot and must not be used as a substitute for rule-making through negotiation.

9.14 Canada also claims that the United States has violated the "fair comparison" requirement of Article 2.4 of the *AD Agreement* by the application of zeroing in this case, because zeroing unjustifiably operates to give greater weight to transactions included in the averaging process for which the export price is less than the normal value than to those for which the export price is greater than the normal value. Canada finds support for its position in a statement by the Appellate Body in *EC—Bed Linen*.[511] Having found that zeroing was inconsistent with Article 2.4.2, my colleagues exercised judicial economy and declined to rule on this claim. In light of my view that Article 2.4.2 does not prohibit

---

[511] "We are also of the view that a comparison between export price and normal value that does *not* take fully into account the prices of *all* comparable export transactions—such as the practice of "zeroing" in this dispute—is *not* a "fair comparison" between export price and normal value, as required by Article 2.4 and 2.4.2." (Appellate Body Report, *EC—Bed Linen*, para.55)

zeroing, however, it is appropriate for me to proceed to a consideration of this alternative claim by Canada.

9.15 I recall that Article 2.4 provides that "[a] fair comparison shall be made between the export price and the normal value." There has not to date been any substantial analysis in WTO dispute settlement as to the precise legal role of this language, including whether it establishes an independent legal obligation or rather serves only to inform interpretation of other operative provisions of Article 2. Much less has there been any significant consideration of the manner in which it is to be interpreted and applied.[512] Nor did the parties provide significant argumentation on this issue. That said, the first sentence of Article 2.4 appears to be drafted in a manner which implies that it is independently operational and legally binding[513], and I will thus proceed on that assumption for the purposes of my consideration of this claim.

9.16 In terms of approach, I believe that a claim based on a highly general test such as "fair comparison" should be approached with caution by treaty interpreters. The concept of fairness in the abstract is highly subjective, and a too-ready reliance on the "fair comparison" requirement could result in interpretations that were highly unpredictable. Further, I am not inclined to accept that the drafters intended that the Members abdicate their responsibility to negotiate rules in this area and leave the rule-making function in the hands of

---

[512] The Appellate Body has stated that "Article 2.4 sets forth a general obligation to make a "fair comparison" between export price and normal value. This general obligation that, in our view, informs all of Article 2, but applies, in particular, to Article 2.4.2 which is specifically made 'subject to the provisions governing fair comparison in [Article 2.4]'." (Appellate Body Report, *EC—Bed Linen*, para.59)

[513] As compared with the drafting of its predecessor provision in the *Tokyo Round AD Code*, Article 2.6, which provided that "[i]n order to affect a fair comparison . . . the two prices shall be compared at the same level of trade . . . .".

the dispute settlement system. Taking this into account, I approach Article 2.4's "fair comparison" requirement with two elements in mind. First, any conception of "fairness" (and "unfairness") should be solidly rooted in the context provided by the *AD Agreement* (and perhaps the *WTO Agreement* more generally). Second, given the subjectivity of the concept of fairness, the principles of Article 17.6(ii) of the *AD Agreement* regarding permissible interpretations are particularly relevant.

9.17 Canada has made only general statements regarding why the application of the zeroing methodology by DOC in this case failed to produce a "fair comparison". In response to a question from the Panel on this issue, Canada responded that a comparison conducted on the basis of zeroing cannot be considered to produce a "fair comparison" within the meaning of Article 2.4, because it unjustifiably operates to give greater weight to transactions included in the averaging process for which the export price is less than the normal value, than to those for which the export price is greater than the normal value.[514] In response to another question to Canada regarding the benchmark against which Canada would test whether a comparison is fair or unfair[515], Canada responded in general terms and did not explain how it applied its "benchmark" to this case.

9.18 In my view, Canada's explanation amounts to little more than an assertion that because zeroing (when combined with multiple averaging) may result in a margin of dumping which is higher than that which would have resulted from comparing a single weighted average export price to a single weighted average normal value, it does not produce a fair comparison. If Article 2.4.2 required that a margin of dumping be based on a single average to average comparison, then Canada's assertion that greater weight was given to some

---

[514] Canada response to question 108(a) of the Panel.

[515] Question 108(b) by the Panel.

transactions than to others might be correct (if superfluous). It has however been established that multiple averaging is not prohibited by Article 2.4.2 (as of course neither is a transaction-by-transaction methodology). I further note that Canada does not contend that DOC gave greater weight to certain export transactions than to others in its performance of each average-to-average comparison. Nor did DOC fail to take into account any export transactions, as the overall amount of dumping found was divided over the full amount of all export transactions in order to calculate a margin of dumping. Rather, Canada is simply arguing that it is unfair not to provide credit for negative dumping margins, apparently purely because this results in a higher dumping margin than would be the case if such credit were given.

9.19 I note that the differing views of the parties regarding interpretation of Article 2.4 appear to reflect an underlying difference regarding the concept of "dumping". One school of thought is that "dumping" relates to the average pricing behaviour of an exporter/producer over time. For those who hold this view, the fact that a particular export transaction is made at a price that is below the price of a comparable transaction in the home market of the exporting country (or is below cost) does not necessarily mean that dumping has occurred, if another export transaction is made at a price which is higher than the home market price. They believe that exporters should be given "credit" for selling above normal value, and consider zeroing to be illogical. Others consider that any time a particular export transaction occurs at a price that is below the price of a comparable transaction in the home market of the exporting country (or is below cost), dumping has occurred. From this perspective, overall margins of dumping are calculated simply because it is impractical to calculate and impose anti-dumping duties with respect to each export transaction, and the idea that such a transaction should not be viewed as dumped merely because

another export transaction occurs at a higher price makes no sense.

9.20 The difference between these two approaches can be understood on the basis of a simple example. Assume there are two home market sales and two export sales of a product during the period of investigation. Both home market sales are made at a price of 100. One of the export sales is made at a price of 50, the other at a price of 150. Under one school of thought, what is relevant is average pricing behaviour. Since the average normal value and average export price are both 100, there is no dumping and no duties should be imposed. Under the second school of thought, one of the two sales was at a dumped price while the other was not. Duties should therefore be collected on the dumped sale. However, a dumping margin should be calculated that would reflect that only some sales were dumped. Using zeroing, the total amount of dumping (50) would be divided by total export sales (200), resulting in a 25 per cent margin. Imposition of a 25 per cent duty on the two export transactions would result in the collection of duties in the amount of 50, the same amount of duties as would have been collected had dumping been determined and duties assessed for each transaction.[516]

9.21 Arguments may be advanced for each of the conceptual approaches identified above. For the "average pricing behaviour" advocates, it is simply not consistent with commercial reality to expect that exporters will be able to fine-tune their pricing on a transaction by transaction basis to avoid dumping. Advocates of the alternative approach argue that the harm caused to domestic producers by a dumped transaction—e.g., the loss of a sale or sale at a lower price than would have otherwise occurred—is not undone simply because another export transaction is made at greater than normal value, nor is the damage caused by dumping of a

---

[516] *See EC—Audio Cassettes* (unadopted) for an analysis of the "fair comparison" requirement which reflects this analytical approach.

particular type or model undone simply because another model is sold at greater than normal value. Both approaches have strengths and weaknesses.

9.22 My task is not of course to decide which conceptual approach *I* prefer, but to examine whether the *AD Agreement* shows such a preference. The Agreement does not contain any preamble or statement of object and purpose[517], and in my view there is no basis to conclude that the Agreement is premised on the "average pricing behaviour" approach. In fact, an early GATT Group of Experts Report on antidumping noted that "the ideal method . . . was to make a determination in respect of both dumping and material injury in respect of each single importation of the product concerned . . .", and this could be taken to suggest the contrary.[518] The fact that the *AD Agreement* permits the use of variable duties as a basis for duty collection is a further basis to conclude that, at a

---

[517] Article VI of *GATT 1994* does however state that "dumping . . . is to be condemned if it causes or threatens material injury . . . ."

[518] *Anti-Dumping and Countervailing Duties*, Second Report of the Group of Experts adopted by the CONTRACTING PARTIES on 27 May 1960, BISD 9th Supp. p. 194. It is clear that under the "ideal method" identified in the Report non-dumped transactions would neither be subject to anti-dumping duties nor used to offset dumped transactions. In their Report, the Group of Experts however concluded that such a method was "clearly impracticable", in particular as regards injury, and for this reason a pre-selection system—i.e. a system where the margin of dumping for future imports is established, at least provisionally, on the basis of a prior period—seemed to be the most satisfactory. This "pre-selection" approach is the basis for virtually all anti-dumping systems today. The application of an *ad valorem* duty for a product, calculated based on the transaction-by-transaction methodology comparison method in paragraph 2.4.2 combined with the aggregation of the results of the individual comparisons using zeroing, is mathematically equivalent and would result in the collection of anti-dumping duties on the product as a whole in the same amount as if the "ideal method" had been applied. Zeroing when aggregating the results of multiple comparisons under a multiple averaging approach would of course generally result in collection of a *lower* amount of total duties than the "ideal method".

minimum, the *AD Agreement* is not premised exclusively on an "average pricing behaviour" approach.[519, 520] Thus, I fail to see how it may be concluded, based upon the *AD Agreement* itself, that a calculation methodology that does not reflect the "average pricing behaviour" approach is unfair in the sense of Article 2.4.

9.23 I am aware that the Appellate Body in *EC—Bed Linen* expressed the view that zeroing is inconsistent with the "fair comparison" requirement in Article 2.4. I note however that this statement is *obiter dictum*, as Article 2.4 was not part of a claim before the Appellate Body. More importantly, I note that the Appellate Body did not set out any of its reasoning underlying this statement. I do not consider that I would be acting in a manner consistent with my obligations under Article 11 of the *DSU* to perform a "objective assessment of the matter" if I were simply to find in favour of Canada on the basis of such an unsupported statement.

---

[519] Under a "variable duty" approach to duty collection, a Member that has established in an investigation that injurious dumping exists does not impose an *ad valorem* or specific duty, but rather imposes duties *on a transaction by transaction basis* where the export price is below the normal value determined during the investigation. Under such a system, the fact that one transaction occurs at a price in excess of normal value does not excuse the exporter from paying duties on another transaction that occurs at a price that is less than normal value. This approach which is referred to in Article 9.4(ii) of the *AD Agreement* as a "prospective normal value", has recently been found to be consistent with the *AD Agreement*. *See* Panel Report, *Argentina—Poultry*, paras. 7.345-7.367.

[520] It is also interesting to note that, when under Article 9.4 an investigating authority is called upon to determine a rate for un-investigated exporters, it is not required to give credit for any "negative dumping" by investigated exporters. Thus, the *AD Agreement* does not in this context even consider the possibility that negative margins should be taken into account when aggregating the results of dumping calculations for selected exporters or producers in order to establish a margin of dumping for un-investigated exporters or producers.

9.24 For the foregoing reasons, and taking into account the standard of review under Article 17.6(ii), I would conclude that Canada has not established that the application of zeroing in the underlying investigation methodology was inconsistent with the United States' obligation under Article 2.4 to conduct a "fair comparison."

---

**APPENDIX G**

**WORLD TRADE ORGANIZATION**

**WT/DS244/AB/R**
15 December 2003
(03-6603)

Original: English

# UNITED STATES—SUNSET REVIEW OF ANTI-DUMPING DUTIES ON CORROSION-RESISTANT CARBON STEEL FLAT PRODUCTS FROM JAPAN

**AB-2003-5**

***Report of the Appellate Body***

* * * *

## VI. Japan's Specific Claims under Article 11.3 of the *Anti-Dumping Agreement*

* * * *

### C. *The Dumping Margins Used in the CRS Sunset Review*

#### 1. *Japan's Appeal*

118. Before the Panel, Japan challenged USDOC's reliance in the CRS sunset review[129] on the dumping margins calculated in the two previous administrative reviews. The Panel noted that Japan did not challenge the duties collected pursuant to the administrative reviews or contend that the use, in sunset reviews, of margins calculated in administrative reviews is *per se* inconsistent with the *Anti-Dumping Agreement*.[130] Rather, Japan argued only that USDOC could not, in the CRS sunset review, rely on the margins in question because they had been calculated using a "zeroing" methodology[131] that the Appellate Body has found to be inconsistent with Article 2.4.[132]

---

[129] As explained above, Japan's appeal on this issue is limited to the CRS sunset review and does not extend to the Sunset Policy Bulletin "as such". *Supra*, para. 70.

[130] Panel Report, para. 7.157.

[131] Before the Panel, Japan stated that "USDOC has a standard practice of using the zeroing methodology to eliminate all negative dumping margins." Japan also stated that "USDOC calculated NSC's dumping margin in . . . [the] administrative reviews by zeroing the negative margins." (Japan's first submission to the Panel, paras. 181-182)

[132] Japan's first submission to the Panel, para. 176, referring to Appellate Body Report, *EC—Bed Linen*. The Final Results of the CRS sunset review were published on 2 August 2000. The Appellate Body Report in *EC—Bed Linen*, in which we found a zeroing methodology of the European Communities to be inconsistent with the *Anti-Dumping*

119. The Panel construed Japan's claim as "predicated on an inconsistency with Article 2.4" of the *Anti-Dumping Agreement*.[133] The Panel found that, in the CRS sunset review, the United States did not act inconsistently with that provision by relying on the dumping margins in question[134] because "the substantive disciplines in Article 2 governing the calculation of dumping margins in making a *determination of* dumping [do not] apply in making a *determination of likelihood of continuation or recurrence of* dumping under Article 11.3."[135] The Panel also examined, in the alternative, whether the United States acted inconsistently with Article 11.3 in the CRS sunset review.[136] The Panel stated that:

> . . . it would not have been unreasonable for the DOC, in the particular circumstances of this case, to have considered that these administrative review dumping margins could properly be taken into account in considering whether likelihood of continuation or recurrence of "dumping" existed.[137]

120. The Panel therefore found, in the alternative, that the United States did not act inconsistently with Article 11.3.[138]

121. On appeal, Japan argues that the Panel erred in interpreting the obligations of the United States under Articles 2.4 and 11.3 of the *Anti-Dumping Agreement*. Accordingly,

---

*Agreement*, was subsequently circulated to WTO Members on 1 March 2001 and adopted on 12 March 2001. See *infra*, para. 134.

[133] Panel Report, para. 7.171.

[134] *Ibid.*, para. 7.170. See also para. 8.1(d)(iii).

[135] *Ibid.*, para. 7.168. (original emphasis)

[136] *Ibid.*, para. 7.172. The Panel considered that this "alternative" analysis would be constructive "in the event that we have construed Japan's claims and arguments . . . in an overly restrictive manner". (Panel Report, para. 7.172)

[137] *Ibid.*, para. 7.183.

[138] *Ibid.*, para. 7.184. See also para. 8.1(d)(iii).

Japan asks us to reverse the above findings of the Panel and to find that, in the CRS sunset review, the United States acted inconsistently with Article 2.4 in conjunction with Article 2.1 and, therefore, with Article 11.3 of the *Anti-Dumping Agreement* by relying on dumping margins calculated in previous administrative reviews using a "zeroing" methodology.[139] Like the Panel[140], we stress that Japan challenges USDOC's use of these margins only in the CRS *sunset review*. Japan does not contend, in this proceeding, that the calculation of dumping margins in the *administrative reviews*, or the collection of duties on the basis of those margins, was inconsistent with the *Anti-Dumping Agreement*.

122. In addressing this issue, we first consider the reasons for the Panel's findings regarding Articles 2.4 and 11.3 of the *Anti-Dumping Agreement*, keeping in mind the specific context of the CRS sunset review. We then assess whether, in the circumstances of the CRS sunset review, USDOC acted inconsistently with Article 2.4 or Article 11.3 by relying on dumping margins calculated in previous administrative reviews allegedly using a zeroing methodology.

* * * *

3. *Completing the Analysis*

133. We now consider whether we can complete the analysis and rule on whether the United States acted inconsistently with Article 2.4 or Article 11.3 in the CRS sunset review in relation to this issue. Japan argues that the United States acted inconsistently with these provisions by relying on the dumping margins from the administrative reviews because these margins had been calculated using a

---

[139] Japan states that, in calculating these margins, "DOC zeroed—literally, DOC ignored—negative margins." (Japan's appellant's submission, para. 39)

[140] *Supra*, para. 118.

zeroing methodology.[157] We begin by recalling our findings in *EC—Bed Linen*, and then we examine the implications of those findings for the present appeal.

134. In *EC—Bed Linen*, we upheld the finding of the panel that the European Communities acted inconsistently with Article 2.4.2 of the *Anti-Dumping Agreement* by using a "zeroing" methodology[158] in the anti-dumping investigation at issue in that case.[159] We held that the European Communities' use of this methodology "inflated the result from the calculation of the margin of dumping."[160] We also emphasized that a comparison such as that undertaken by the European Communities in that case is not a "fair comparison" between export price and normal value as required by Articles 2.4 and 2.4.2.[161]

135. When investigating authorities use a zeroing methodology such as that examined in *EC—Bed Linen* to calculate a dumping margin, whether in an original investigation or otherwise, that methodology will tend to inflate the margins calculated. Apart from inflating the margins, such a methodology could, in some instances, turn a negative margin of dumping into a positive margin of dumping. As the Panel itself recognized in the present dispute, "zeroing . . . may lead to an affirmative determination that dumping exists where no dumping would have been established in the absence of zeroing."[162] Thus, the inherent

---

[157] Japan states that, in calculating these margins, "DOC zeroed—literally, DOC ignored—negative margins." (Japan's appellant's submission, para. 39)

[158] The methodology used by the European Communities is described in paragraph 47 of our Report in *EC—Bed Linen*.

[159] Appellate Body Report, *EC—Bed Linen*, para. 66.

[160] *Ibid.*, para. 55.

[161] *Ibid.*

[162] Panel Report, para. 7.159.

bias in a zeroing methodology of this kind may distort not only the magnitude of a dumping margin, but also a finding of the very existence of dumping.

136. In evaluating whether the United States acted inconsistently with the *Anti-Dumping Agreement* in the CRS sunset review by relying on the dumping margins from the administrative reviews, we note that the United States seemed to accept that USDOC's methodology in the administrative reviews was "a methodology in which no offset is granted to the respondent for negative differences between the normal value and export price (or constructed export price) of individual transactions".[163] It appears, therefore, that there was some similarity between the methodology used by USDOC in the administrative reviews and the methodology used by the European Communities and examined in *EC—Bed Linen*. However, the United States does not accept Japan's characterization of USDOC's methodology as "zeroing".[164] The United States also maintains that our Report in *EC—Bed Linen* is not relevant to USDOC's methodology because, *inter alia*, USDOC calculated dumping margins on an "average-to-transaction" basis, whereas the European Communities calculated dumping margins on an "average-to-average" basis.[165]

137. Turning to the Panel's description of the methodology used by USDOC in the administrative reviews, we note that the Panel merely stated that USDOC "applied a weighted

---

[163] United States' first submission to the Panel, para. 125. In addition, the United States stated before the Panel that, under USDOC's methodology, "no dumping duty—positive or negative—was computed for US sales made at non-dumped prices." (United States' response to Question 27 posed by the Panel, para. 62; Panel Report, p. E-66)

[164] United States' first submission to the Panel, para. 144 (referring to USDOC's use of "allegedly 'zeroed' dumping margins").

[165] United States' appellee's submission, footnote 56 to para. 40, as clarified by the United States at the oral hearing.

average-to-transaction methodology in establishing the dumping margins in administrative reviews."[166] This does not appear to be in dispute. However, the details of the alleged "zeroing" in the methodology used by USDOC in the administrative reviews are less clear. The Panel Report contains no other factual findings about the particular methodology used by USDOC in the administrative reviews, nor any clear indication of whether the Panel considered that this methodology entailed "zeroing" of some kind. In these circumstances, and in the absence of uncontested facts on the Panel record, it is not possible for us to assess whether the methodology that USDOC used in calculating the dumping margins in the administrative reviews was equivalent in effect to the methodology used by the European Communities and considered by us in *EC—Bed Linen*.

138. Given the lack of factual findings by the Panel regarding the methodology used by USDOC in the administrative reviews, we do not have a sufficient factual basis to complete the analysis of Japan's claim on this issue. For these reasons, we find that we are unable to rule on whether the United States acted inconsistently with Article 2.4 or Article 11.3 of the *Anti-Dumping Agreement* by relying on the dumping margins from the administrative reviews in making its likelihood determination in the CRS sunset review.

* * * *

[166] Panel Report, para. 7.158.

**APPENDIX H**

**WORLD TRADE ORGANIZATION**

**WT/DS141/AB/R**
1 March 2001
(01-0973)

Original: English

# EUROPEAN COMMUNITIES—ANTI-DUMPING DUTIES ON IMPORTS OF COTTON-TYPE BED LINEN FROM INDIA

**AB-2000-13**

***Report of the Appellate Body***

* * * *

## IV. Article 2.4.2 of the *Anti-Dumping Agreement*

46. The first issue raised in this appeal is whether the practice of "zeroing" when establishing "the existence of margins of dumping", as applied by the European Communities in the anti-dumping investigation at issue in this dispute, is consistent with Article 2.4.2 of the *Anti-Dumping Agreement*.

47. The practice of "zeroing", as applied in this dispute, can briefly be described as follows[16]: first, the European Communities identified with respect to the product under investigation—cotton-type bed linen—a certain number of different "models" or "types" of that product. Next, the European Communities calculated, for each of these models, a *weighted average* normal value and a *weighted average* export price. Then, the European Communities compared the weighted average normal value with the weighted average export price for each model. For some models, normal value was *higher* than export price; by subtracting export price from normal value for these models, the European Communities established a "*positive* dumping margin" for each model. For other models, normal value was *lower* than export price; by subtracting export price from normal value for these other models, the European Communities established a "*negative* dumping margin" for each model.[17] Thus, there is a "positive dumping margin" where there *is* dumping, and a "negative dumping margin" where there *is not*. The "positives" and "negatives" of the amounts in this calculation are an indication of precisely *how much* the export price is above or below the normal value. Having made this calculation, the European Communities then added up the

---

[16] For a more detailed description, see Panel Report, para. 6.102.

[17] For these latter models, in other words, dumping had not occurred, as the *export price exceeded the normal value*.

amounts it had calculated as "dumping margins" for each model of the product in order to determine an *overall* dumping margin for the product *as a whole*. However, in doing so, the European Communities treated any "negative dumping margin" as zero—hence the use of the word "zeroing". Then, finally, having added up the "positive dumping margins" and the zeroes, the European Communities divided this sum by the cumulative total value of all the export transactions involving all types and models of that product. In this way, the European Communities obtained an overall margin of dumping for the product under investigation.

48. With respect to this first issue appealed, the Panel found that:

> . . . the European Communities acted inconsistently with Article 2.4.2 of the AD Agreement in establishing the existence of margins of dumping on the basis of a methodology which included zeroing negative price differences calculated for some models of bed linen.[18]

49. The European Communities appeals this finding. In defending its practice of "zeroing", the European Communities principally argues that the Panel was mistaken about the ordinary meaning of Article 2.4.2. According to the European Communities, Article 2.4.2 requires a comparison with a "weighted average of prices of all *comparable* export transactions" (emphasis added), which, in the view of the European Communities, as we understand it, is not the same as requiring a comparison with a weighted average of *all* export transactions. Emphasizing the presence in Article 2.4.2 of the word "comparable", the European Communities maintains that, where the product under investigation consists of various "non-comparable" types or models, the investigating authorities should first calculate "margins of

---

[18] Panel Report, para. 6.119.

dumping" for each of the "non-comparable" types or models, and, then, at a subsequent stage, combine those "margins" in order to calculate an overall margin of dumping for the product under investigation. Thus, the European Communities sees two stages in calculating margins of dumping in such an anti-dumping investigation, and contends that Article 2.4.2 provides *no guidance* as to how the "margins of dumping" for each of the types or models should be combined in the second stage in order to calculate an overall margin of dumping for the product under investigation. On this reasoning, the European Communities asserts that, as "zeroing" takes place during this second stage of the domestic anti-dumping process, "zeroing" cannot be inconsistent with Article 2.4.2. Accordingly, the European Communities concludes that the Panel failed to give proper meaning to the word "comparable" as well as to the comparability requirement in Article 2.4.2[19], erroneously applied Article 2.4.2 to the calculation of the overall margin of dumping for the product under investigation[20], and erred in its overall analysis of this issue on the premise that dumping margins can be established only for a *product*.[21]

50. As always, we turn first to the text of the provision at issue on appeal. Article 2.4.2 of the *Anti-Dumping Agreement* states:

> Subject to the provisions governing fair comparison in paragraph 4, the *existence of margins of dumping* during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of

---

[19] European Communities' appellant's submission, paras. 14-20 and 38-41.

[20] European Communities' appellant's submission, paras. 21-30.

[21] European Communities' appellant's submission, paras. 31-37.

> normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison. (emphasis added)

51. Article 2.4.2 of the *Anti-Dumping Agreement* explains how domestic investigating authorities must proceed in establishing "the existence of margins of dumping", that is, it explains how they must proceed in establishing that there *is* dumping. Toward this end, Article 2.1 states:

> For the purpose of this Agreement, a *product is to be considered as being dumped*, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country. (emphasis added)

From the wording of this provision, it is clear to us that the *Anti-Dumping Agreement* concerns the dumping of a *product*, and that, therefore, the margins of dumping to which Article 2.4.2 refers are the margins of dumping for a *product*.

52. We observe that, in this case, the European Communities defined the *product* at issue in its anti-dumping investigation as follows:

> The *proceeding covers bed linen of cotton–type fibres*, pure or mixed with man-made fibres or flax, bleached, dyed or printed. Bed linen includes bed sheets, duvet covers and pillow cases, packaged for sale either separately or in sets.

. . .

> Notwithstanding the *different possible product types* due to different weaving construction, finish of the fabric, presentation and size, packing, etc., *all of them constitute a single product for the purpose of this proceeding* because they have the same physical characteristics and essentially the same use.[22] (emphasis added)

53. Thus, of its own accord, the European Communities clearly identified cotton-type bed linen as the *product* under investigation in this case. This is undisputed in this appeal. Having defined the *product* as it did, the European Communities was bound to treat that *product* consistently thereafter in accordance with that definition. Thus, it follows that, with respect to Article 2.4.2, the European Communities had to establish "the existence of margins of dumping" for the *product*—cotton-type bed linen—and not for the various types or models of that product. We see nothing in Article 2.4.2 or in any other provision of the *Anti-Dumping Agreement* that provides for the establishment of "the existence of margins of dumping" for *types or models* of the product under investigation; to the contrary, all references to the establishment of "the existence of margins of dumping" are references to the *product* that is subject of the investigation. Likewise, we see nothing in Article 2.4.2 to support the notion that, in an anti-dumping investigation, two different stages are envisaged or distinguished in any way by this provision of the *Anti-Dumping Agreement*, nor to justify the distinctions the European Communities contends can be made among *types or models* of the same product on the basis of these "two stages". Whatever the method used to calculate the margins of dumping, in our view, these margins must be,

---

[22] Commission Regulation (EC) No 1069/97, *supra*, footnote 3, para. 10. See also Council Regulation (EC) No 2398/97, *supra*, footnote 4, para. 9.

and can only be, established for the *product* under investigation as a whole. We are unable to agree with the European Communities that Article 2.4.2 provides no guidance as to how to calculate an *overall* margin of dumping for the product under investigation.

54. With this in mind, we recall that Article 2.4.2, first sentence, provides that "the existence of margins of dumping" for the product under investigation shall normally be established according to one of two methods. At issue in this case is the first method set out in that provision, under which "the existence of margins of dumping" must be established:

> . . . on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions . . .

55. Under this method, the investigating authorities are required to compare the weighted average normal value with the weighted average of prices of *all* comparable export transactions. Here, we emphasize that Article 2.4.2 speaks of "all" comparable export transactions. As explained above, when "zeroing", the European Communities counted as zero the "dumping margins" for those models where the "dumping margin" was "negative". As the Panel correctly noted, for those models, the European Communities counted "the weighted average export price to be equal to the weighted average normal value . . . despite the fact that it was, in reality, higher than the weighted average normal value."[23] By "zeroing" the "negative dumping margins", the European Communities, therefore, did *not* take fully into account the entirety of the prices of *some* export transactions, namely, those export transactions involving models of cotton-type bed linen where "negative dumping margins" were found. Instead, the European Communities treated those export prices as if they were less than what they were. This, in turn,

---

[23] Panel Report, para. 6.115.

inflated the result from the calculation of the margin of dumping. Thus, the European Communities did *not* establish "the existence of margins of dumping" for cotton-type bed linen on the basis of a comparison of the weighted average normal value with the weighted average of prices of *all* comparable export transactions—that is, for *all* transactions involving *all* models or types of the product under investigation. Furthermore, we are also of the view that a comparison between export price and normal value that does *not* take fully into account the prices of *all* comparable export transactions—such as the practice of "zeroing" at issue in this dispute—is *not* a "fair comparison" between export price and normal value, as required by Article 2.4 and by Article 2.4.2.

56. We are mindful that Article 2.4.2 provides for "a comparison of a weighted average normal value with a weighted average of prices of all *comparable* export transactions". (emphasis added) In our view, the word "comparable" in Article 2.4.2 does not affect, or diminish in any way, the obligation of investigating authorities to establish the existence of margins of dumping on the basis of "a comparison of the weighted average normal value with the weighted average of prices of *all* comparable export transactions". (emphasis added)

57. The ordinary meaning of the word "comparable" is "able to be compared".[24] "Comparable export transactions" within the meaning of Article 2.4.2 are, therefore, export transactions that are able to be compared. The European Communities argues before us that export transactions involving different types or models of cotton-type bed linen are not "comparable" because different types or models of cotton-type bed linen have very different physical characteristics. Specifically, the European Communities suggests that the differences between the various models or

---

[24] *The Concise Oxford Dictionary of Current English* (Clarendon Press, 1995), p. 269.

types of bed linen involved in the relevant export transactions are "so substantial that they cannot be eliminated by making adjustments for differences in physical characteristics".[25] However, as we have already noted, at the very outset of its anti-dumping investigation, the European Communities identified, of its own accord, cotton-type bed linen as the *product* under investigation. Moreover, in defining cotton-type bed linen as the product at issue, the European Communities stated that "the *different* possible *product types . . . constitute a single product* for the purpose of this proceeding because *they have the same physical characteristics* and *essentially the same use*".[26] (emphasis added) Furthermore, we observe that, in the context of defining the product at issue, the European Communities also made the following determination relating to the identity of the "like product" on the Community market subject to its investigation:

> The Commission examined whether cotton-type bed linen produced by the Community industry and sold on the Community market, as well as cotton-type bed linen produced in Egypt, India and Pakistan and sold on the Community market and on their domestic markets were alike.
>
> . . .
>
> The Commission concluded that although there were differences in the mix of products produced in the Community and that sold for export to the Community or sold domestically in the countries concerned, *there were no differences in the basic characteristics and uses of the different types and qualities of bed linen of cotton-*

---

[25] European Communities' appellant's submission, para. 39. See also para. 40 and footnote 34 of the European Communities' appellant's submission.

[26] Commission Regulation (EC) No 1069/97, *supra*, footnote 3, para. 10.

> *type fibres*. Therefore domestic and export types in the countries concerned and types produced in the Community were considered *like products* within the meaning of Article 1(4) of Regulation (EC) No 384/96 . . .[27] (emphasis added)

58. Having defined the product at issue and the "like product" on the Community market as it did, the European Communities could not, at a subsequent stage of the proceeding, take the position that some types or models of that product had physical characteristics that were so different from each other that these types or models were not "comparable". All types or models falling within the scope of a "like" product must necessarily be "comparable", and export transactions involving those types or models must therefore be considered "comparable export transactions" within the meaning of Article 2.4.2.

59. This interpretation of the word "comparable" in Article 2.4.2 is reinforced by the context of this provision. Article 2.4 of the *Anti-Dumping Agreement* states in relevant part:

> A *fair comparison* shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. *Due allowance* shall be made in each case, on its merits, *for differences which affect price comparability*, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability. (emphasis added)

---

[27] Commission Regulation (EC) No 1069/97, *supra*, footnote 3, paras. 11 and 14. See also Council Regulation (EC) No 2398/97, *supra*, footnote 4, para. 9.

Article 2.4 sets forth a general obligation to make a "fair comparison" between export price and normal value. This is a general obligation that, in our view, informs all of Article 2, but applies, in particular, to Article 2.4.2 which is specifically made "subject to the provisions governing fair comparison in [Article 2.4]". Moreover, Article 2.4 sets forth specific obligations to make comparisons at the same level of trade and at, as nearly as possible, the same time. Article 2.4 also requires that "due allowance" be made for differences affecting "price comparability". We note, in particular, that Article 2.4 requires investigating authorities to make due allowance for "differences in . . . physical characteristics".

60. We note that, while the word "comparable" in Article 2.4.2 relates to the comparability of export transactions, Article 2.4 deals more broadly with a "fair comparison" between export price and normal value and "price comparability". Nevertheless, and with this qualification in mind, we see Article 2.4 as useful context sustaining the conclusions we draw from our analysis of the word "comparable" in Article 2.4.2. In our view, the word "comparable" in Article 2.4.2 relates back to both the general and the specific obligations of the investigating authorities when comparing the export price with the normal value. The European Communities argues on the basis of the "due allowance" required by Article 2.4 for "differences in physical characteristics" that distinctions can be made among different types or models of cotton-type bed linen when determining "comparability". But here again we fail to see how the European Communities can be permitted to see the physical characteristics of cotton-type bed linen in one way for one purpose and in another way for another.[28]

61. In support of its appeal of the Panel's interpretation of Article 2.4.2, the European Communities argues, additionally, that this interpretation would not allow Members to counter

---

[28] See *supra*, paras. 57-58.

dumping "targeted" to certain types of the product under investigation.[29] With respect to the notion of "targeted" dumping, we note that Article 2.4.2, second sentence, states:

> A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find *a pattern of export prices which differ significantly among different purchasers, regions or time periods*, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison. (emphasis added)

62. This provision allows Members, in structuring their anti-dumping investigations, to address three kinds of "targeted" dumping, namely dumping that is targeted to certain purchasers, targeted to certain regions, or targeted to certain time periods. However, neither Article 2.4.2, second sentence, nor any other provision of the *Anti-Dumping Agreement* refers to dumping "targeted" to certain "models" or "types" of the same product under investigation. It seems to us that, had the drafters of the *Anti-Dumping Agreement* intended to authorize Members to respond to such kind of "targeted" dumping, they would have done so explicitly in Article 2.4.2, second sentence. The European Communities has not demonstrated that any provision of the Agreement implies that targeted dumping may be examined in relation to specific types or models of the product under investigation. Furthermore, we are bound to add that, if the European Communities wanted to address, in particular, dumping of certain types or models of bed linen, it could have defined, or redefined, the *product* under investigation in a narrower way.[30]

---

[29] European Communities' appellant's submission, paras. 46-49.

[30] The European Communities also argues in its appellant's submission, paras. 42-45, that the Panel's interpretation of Article 2.4.2 would

63. Finally, the European Communities argues that the Panel did not establish that the interpretation of Article 2.4.2 by the European Communities was "impermissible" and that, therefore, the Panel failed to apply the standard of review laid down in Article 17.6(ii) of the *Anti-Dumping Agreement*.[31] On this, we observe that Article 17.6(ii) states:

> the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

64. In this case, the Panel explicitly recognized that it was to interpret the *Anti-Dumping Agreement* in accordance with the customary rules of interpretation of public international law as set out in the *Vienna Convention*.[32] Having interpreted Article 2.4.2 accordingly, the Panel found:

> . . . that the European Communities acted *inconsistently* with Article 2.4.2 of the AD Agreement in establishing the existence of margins of dumping on the basis of a methodology which included zeroing negative price

---

disadvantage those importing Members which collect anti-dumping duties on a "prospective" basis when compared to those importing Members which collect anti-dumping duties on a "retrospective" basis. We note, though, that Article 2.4.2 is not concerned with the collection of anti-dumping duties, but rather with the determination of "the existence of margins of dumping". Rules relating to the "prospective" and "retrospective" collection of anti-dumping duties are set forth in Article 9 of the *Anti-Dumping Agreement*. The European Communities has not shown how and to what extent these rules on the "prospective" and "retrospective" collection of anti-dumping duties bear on the issue of the establishment of "the existence of dumping margins" under Article 2.4.2.

[31] European Communities' appellant's submission, paras. 50-58.

[32] Panel Report, para. 6.46.

differences calculated for some models of bed linen.[33] (emphasis added)

65. It appears clear to us from the emphatic and unqualified nature of this finding of inconsistency that the Panel did not view the interpretation given by the European Communities of Article 2.4.2 of the *Anti-Dumping Agreement* as a "permissible interpretation" within the meaning of Article 17.6(ii) of the *Anti-Dumping Agreement*. Thus, the Panel was not faced with a choice among multiple "permissible" interpretations which would have required it, under Article 17.6(ii), to give deference to the interpretation relied upon by the European Communities. Rather, the Panel was faced with a situation in which the interpretation relied upon by the European Communities was, to borrow a word from the European Communities, "impermissible". We do not share the view of the European Communities that the Panel failed to apply the standard of review set out in Article 17.6(ii) of the *Anti-Dumping Agreement*.

66. For all these reasons, we uphold the finding of the Panel in paragraph 6.119 of the Panel Report that the practice of "zeroing" when establishing "the existence of margins of dumping", as applied by the European Communities in the anti-dumping investigation at issue in this dispute, is inconsistent with Article 2.4.2 of the *Anti-Dumping Agreement*.

* * * *

[33] Panel Report, para. 6.119.

**APPENDIX I**

A-588-054
A-588-604
ARP: 1998-99
IA/Group III: DS/PT
Public Document

MEMORANDUM TO: Bernard T. Carreau, fulfilling the duties of
Assistant Secretary for Import Administration

FROM: Joseph A. Spetrini
Deputy Assistant Secretary
AD/CVD Enforcement Group III

SUBJECT: Issues and Decision Memorandum for the 1998-1999 Administrative Reviews of Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, from Japan (A-588-604/A-588-054); Final Results of Antidumping Duty Administrative Reviews

*Summary*

We have analyzed the comments and rebuttals of interested parties in the 1998-1999 administrative reviews of the antidumping duty order on tapered roller bearings (TRBs) and parts thereof, finished and unfinished, from Japan (A-588-604), and the antidumping finding on TRBs, four inches or less in outside diameter, and components thereof, from Japan (A-588-054). As a result of our analysis, we have made changes, including corrections of certain programming and

ministerial errors, in the margin calculations. We recommend that you approve the positions that we have developed in the "Discussion of the Issues" section of this memorandum. Below is the complete list of the issues in these administrative reviews on which we received comments and rebuttals by parties:

1. Facts Available/Further Manufacturing
2. Adjustments to Normal Value
3. Adjustments to United States Price
4. Cost of Production and Constructed Value
5. Level of Trade
6. Arm's-length Test
7. Sales Outside the Ordinary Course of Trade
8. Model Match
9. Margin Calculations/Assessment Rates
10. Ministerial Errors

*Background*

On November 7, 2000, we published in the *Federal Register* the preliminary results of the 1998-99 administrative reviews of the antidumping duty order and finding on TRBs from Japan. *See Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, from Japan; Preliminary Results of Antidumping Duty Administrative Reviews*, 65 FR 66711 (*Preliminary Results*).

The period of review (POR) is October 1, 1998, through September 30, 1999. The review of the A-588-054 case covers TRB sales by two manufacturers/exporters, Koyo Seiko Co., Ltd. (Koyo) and NSK Ltd. (NSK). The review of the A-588-604 case covers TRB sales by three manufacturers/ exporters (Koyo, NSK, and NTN Corporation (NTN)). We invited parties to comment on our preliminary results of review. We received case briefs from Koyo, NSK, NTN and the petitioner, The Timken Co. (Timken), on December 7,

2000. We received rebuttal briefs from each of the same parties on December 19, 2000. At the request of certain interested parties, we held a public hearing on January 24, 2001.

*Discussion of the Issues*

* * * *

*9. Margin Calculations/Assessment Rates*

*Comment 1. Setting Negative Margins to Zero*

NSK states that in the instant review, the Department treated U.S. sales with negative margins (sales made at or above home market prices) as having a zero percent dumping margin, a practice known as "zeroing." NSK cites *European Communities—Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/R, ¶ 6.119 (October 30, 2000) (*EC—Bed Linen*), in which a World Trade Organization (WTO) dispute settlement panel determined that the European Community violated Article 2.4.2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Antidumping Agreement) by zeroing negative price differences when calculating dumping margins. Since the Department has followed a similar methodology in this review by not offsetting positive margins with negative margins, NSK argues, the Department has violated both the Antidumping Agreement and U.S. antidumping law.

Referring to the SAA at 149-150, NSK asserts that the Department's use of zeroing violates the URAA, which amended U.S. antidumping law in order to implement Article 2 of the Antidumping Agreement. NSK then cites *Federal-Mogul Corp. v. United States*, 63 F.3d 1572, 1581 (Fed. Cir. 1995) (*Federal-Mogul*), in which the Federal Circuit stated that "GATT agreements are international obligations, and absent express Congressional language to the contrary, statutes should not be interpreted to conflict with international

obligations." NSK points to the WTO Panel's finding that the requirements of Article 2.4.2 of the Antidumping Agreement must apply to the entire process of calculating dumping margins, and "that there is no 'subsequent stage' which escapes entirely from the strictures of Article 2.4.2." NSK Case Brief at 7, quoting WTO Panel report for *EC—Bed Linen* at ¶ 6.116. NSK contends that although *EC—Bed Linen* "involved a comparison of weighted averages for export prices and normal values, its ruling applies to all dumping methodologies, including the Department's comparison in this review of weighted-average normal values to transaction-specific export prices." NSK Case Brief at 7-8. Therefore, NSK urges the Department to compute its antidumping duty margin by offsetting positive margins with negative margins.

Koyo also states that the Department's practice has been to set the margins to zero for transactions where CEP is higher than NV. Koyo asserts that this practice has been recognized as having the tendency to inflate margins, referring to *Böwe-Passat Reinigungs-und Washereitechnik GmbH v. United States*, 926 F. Supp. 1138, 1150 (CIT 1996) (*Böwe-Passat Reinigungs*) (citing commentators who have discussed this tendency). In light of the WTO dispute settlement panel finding in *EC—Bed Linen* that zeroing is inconsistent with Article 2.4.2 of the Antidumping Agreement, Koyo argues, the Department should discontinue its practice of zeroing. Koyo submits that although Article 2.4.2 of the Antidumping Agreement deals with fair comparisons in antidumping investigations, "the panel's reasoning is equally applicable to administrative reviews." Koyo Case Brief at 27. Citing *Böwe-Passat Reinigungs* at 1150, Koyo contends that zeroing does not result in a fair calculation of the weighted-average margin because it mathematically changes the U.S. price of selected transactions.

Koyo notes that the Court has upheld the Department's practice of zeroing, finding it to be a reasonable interpretation

of section 731 of the Tariff Act. Despite this, Koyo asserts that section 751(a)(2) of the Tariff Act implies that the Department is not permitted to disregard negative margins. Instead, Koyo avers, the statute directs the Department to determine "the normal value and export price (or constructed export price) *of each entry of the subject merchandise* and the dumping margin *for each such entry*." Koyo Case Brief at 27, quoting section 751(a)(2) of the Tariff Act (emphasis added by Koyo). Thus, Koyo maintains that the statute indicates that the Department should calculate a dumping margin for each entry, regardless of whether the entry is positive or negative. Koyo argues that Department should include negative margins in the weighted-average margin calculation instead of following its practice of zeroing, in order to be consistent with the Antidumping Agreement (as interpreted in *EC—Bed Linen*). Like NSK, Koyo cites *Federal-Mogul* at 1581 ("GATT agreements are international obligations, and absent express Congressional language to the contrary, statutes should not be interpreted to conflict with international obligations.") Stating that the Court intended to uphold the Department's practice of zeroing "[u]nless and until it becomes clear that such a practice is impermissible or unreasonable," Koyo contends that *EC—Bed Linen* shows that zeroing is "impermissible." Koyo Case Brief at 28, quoting *Böwe-Passat Reinigungs* at 1150. Therefore, Koyo asserts that the Department should include negative margins in its calculation of Koyo's weighted-average dumping margins.

Timken responds that in *EC—Bed Linen* the WTO panel determined that the Antidumping Agreement did not allow administering authorities to zero negative prices when determining dumping margins by comparing weighted averages in investigations. Timken asserts that the decision in *EC—Bed Linen* was limited to an interpretation of Article 2.4.2 of the Antidumping Agreement, which requires WTO members to establish dumping margins during an

investigation. Citing Article 2.4.2 of the Antidumping Agreement, Timken contends that *EC—Bed Linen* is not relevant to administrative reviews, and therefore holds that the zeroing of negative margins in this administrative review complies with U.S. obligations under the Antidumping Agreement.

With respect to Koyo's argument that zeroing produces unfair results, Timken claims that Koyo has not provided any data illustrating that zeroing produced unfair results in this case. Timken argues that the Department's practice of zeroing negative margins continues to be consistent with the statute, as the purpose of both the Antidumping Agreement and U.S. antidumping law is to provide a remedy for injurious dumping. In fact, Timken states, the statutory scheme does not allow the Department to ignore injurious dumping. Citing *Rhone Poulenc, Inc. v. United States*, 899 F. 2d 1185, 1191 (Fed. Cir. 1990), Timken maintains that the Department is charged with determining dumping margins as accurately as possible. According to Timken, Koyo and NSK's suggestion to offset positive margins with negative margins would not remedy the effect of injurious dumping on the domestic industry. Timken refers to *Koyo Seiko Co., Ltd. v. United States*, 36 F.3d 1156 (Fed. Cir. 1994), in which the Federal Circuit found that allowing foreign manufacturers to offset less-than-fair-value sales with higher priced sales would defeat the statutory purpose. Timken contends that the domestic industry is not remedied by fair-value sales, providing an example in which a foreign producer dumps its product in the United States for the first half of the review period, forcing an already injured industry into bankruptcy, and then recovers its losses by raising prices during the second half of the review period. Timken points out that the Court repeatedly has upheld the Department's established practice of zeroing negative margins in order to avoid cloaking dumping margins, citing *Serampore Indus. v. United*

*States*, 675 F. Supp. 1354 (CIT 1987) (*Serampore*) and *Böwe-Passat Reinigungs*.

Timken argues that pursuant to section 751(a)(2) of the Tariff Act, the Department first determines EP or CEP and then calculates a dumping margin for each entry. Timken contends that there is nothing in the statute, SAA, or legislative history suggesting that the Department change its practice. Citing the statutory definition of "dumping margin" in section 771(35) of the Tariff Act, Timken states that the amount by which NV exceeds EP or CEP of a fairly-traded import is zero. Therefore, Timken asserts, Koyo's argument that section 751(a)(2) of the Tariff Act supports the use of negative margins to offset positive margins is incorrect. In light of the foregoing arguments, Timken requests that the Department disregard Koyo's and NSK's suggestion that the zeroing of negative margins be eliminated.

*Department's Position*: These antidumping duty administrative reviews are being conducted under the domestic laws of the United States, which laws are fully consistent with international obligations. We note that the calculation methodology addressed by respondents has been upheld repeatedly as consistent with domestic law by reviewing domestic courts. See *Serampore* and *Böwe-Passat Reinigungs*. Consequently, the WTO dispute resolution panel reports referred to by respondents, which addressed a matter of WTO jurisprudence, and not domestic U.S. law, is not relevant to this determination. We do note in passing, however, that the report in question addressed EC law and practice and was not a challenge to U.S. law.

* * * *

## APPENDIX J

## WORLD TRADE ORGANIZATION

## AGREEMENT ON IMPLEMENTATION OF ARTICLE VI OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994

("Anti-dumping Agreement")

* * * *

*Members* hereby *agree* as follows:

### *PART I*

* * * *

### *Article 2: Determination of Dumping*

2.1 For the purpose of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.

* * * *

2.4 A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price

comparability.[7] In the cases referred to in paragraph 3, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made. If in these cases price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or shall make due allowance as warranted under this paragraph. The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties.

2.4.1 When the comparison under paragraph 4 requires a conversion of currencies, such conversion should be made using the rate of exchange on the date of sale[8], provided that when a sale of foreign currency on forward markets is directly linked to the export sale involved, the rate of exchange in the forward sale shall be used. Fluctuations in exchange rates shall be ignored and in an investigation the authorities shall allow exporters at least 60 days to have adjusted their export prices to reflect sustained movements in exchange rates during the period of investigation.

2.4.2 Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average

---

[7] It is understood that some of the above factors may overlap, and authorities shall ensure that they do not duplicate adjustments that have been already made under this provision.

[8] Normally, the date of sale would be the date of contract, purchase order, order confirmation, or invoice, whichever establishes the material terms of sale.

normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison.

* * * *

## APPENDIX K.

103d Congress, 2d Session House Document 103-316, Vol. 1

URUGUAY ROUND TRADE AGREEMENTS, TEXTS OF AGREEMENTS, IMPLEMENTING BILL, STATEMENT OF ADMINISTRATIVE ACTION, AND REQUIRED SUPPORTING STATEMENTS

---

**MESSAGE**

FROM

**THE PRESIDENT OF THE UNITED STATES**

TRANSMITTING

THE URUGUAY ROUND TRADE AGREEMENTS, TEXTS OF AGREEMENTS IMPLEMENTING BILL, STATEMENT OF ADMINISTRATIVE ACTION AND REQUIRED SUPPORTING DOCUMENTS

* * * *

## [656] THE URUGUAY ROUND AGREEMENTS ACT

### STATEMENT OF ADMINISTRATIVE ACTION

* * * *

As is the case with earlier Statements of Administrative Action submitted to the Congress in connection with fast-track trade bills, this Statement represents an authoritative expression by the Administration concerning its views regarding the interpretation and application of the law. Furthermore, the Administration understand that it is the expectation of the Congress that future Administrations will observe and apply the interpretations and commitments set out in this Statement. Moreover, since this Statement will be approved by the Congress at the time it implements the Uruguay Round agreements, the interpretations of those agreements included in this Statement carry particular authority.

* * * *

[669] d. Relationship to Federal Law

Section 102 establishes the relationship between the Uruguay Round agreements and U.S. law. The implementing bill, including the authority granted to federal agencies to promulgate implementing regulations, is intended to bring U.S. law fully into compliance with U.S. obligations under those agreements. The bill accomplishes that objective with respect to federal legislation by amending existing federal statutes that would otherwise be inconsistent with the agreements and, in certain instances, by creating entirely new provisions of law.

* * * *

[820] 1. *Definition of Dumping*

Sections 223 and 224 of the bill amend sections 772 and 773 of the Act, establishing new rules regarding the

determination of export price or constructed export price and normal value. Under new section 773(a), as under existing law, the preferred method for identifying and measuring dumping is to compare home market sales of the foreign like product to export sales to the United States. Consistent with the Agreement, if home market sales of a foreign like product do not exist or are not useable as a basis for determining normal value, Commerce may identify and measure dumping by comparing the export price or constructed export price to normal value based on either: (1) sales of the foreign like product to a country other than the United States; or (2) constructed value. The requirement of Article 2.4 of the Agreement that a fair comparison be made between the export price or constructed export price and normal value is stated in and implemented by section 773. To achieve such a fair comparison, section 773 provides for the selection and adjustment of normal value to avoid or adjust for differences between sales which affect price comparability.

* * * *

(2)

No. 04-87

FILED
AUG 19 2004
OFFICE OF THE CLERK

IN THE
**Supreme Court of the United States**

---

KOYO SEIKO CO., LTD.
AND KOYO CORPORATION OF U.S.A.,
*Petitioners,*

*v.*

UNITED STATES OF AMERICA,
*Respondent.*

---

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

---

# BRIEF OF RESPONDENT, THE TIMKEN COMPANY, IN OPPOSITION

---

Terence P. Stewart
*Counsel of Record*
William A. Fennell
Patrick J. McDonough
Amy S. Dwyer
STEWART AND STEWART
2100 M Street, N.W.
Washington, D.C. 20037
(202) 785-4185
*Counsel for Respondent, The Timken Company*

## QUESTIONS PRESENTED

The Timken Company does not agree that petitioners, Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A. (hereinafter "Koyo"), have correctly identified the questions before this Court. Accordingly, Timken restates the questions presented:

1. Whether the Court of Appeals erred in finding that a Department of Commerce interpretation of the Tariff Act was reasonable even though it did not take account of certain WTO panel and Appellate Body reports which: (1) could not affect the imports at issue because they were adopted well after the date of importation; (2) the U.S. does not have to respond to at all; (3) the U.S., if it should choose to respond to them, has not yet done so and is entitled to consider how it will do so (if at all) for a reasonable period (generally between six and fifteen months); and (4) do not address the administrative review phase of antidumping duty proceedings here on appeal?

2. Whether the decision of the Federal Circuit is in conflict with other circuits as to the role of the *Charming Betsy* canon of statutory interpretation in the context of *Chevron* analysis of administrative agency action?

## PARTIES TO THE PROCEEDING

Parties to the proceeding are: (1) the petitioners, Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A. and (2) the respondents, United States of America and The Timken Company.

## CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

The Timken Company does not have a parent company. No publicly held companies own 10% or more of the company's stock.

## TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED | i |
| PARTIES TO THE PROCEEDING | ii |
| CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6 | ii |
| TABLE OF CONTENTS | iii |
| TABLE OF AUTHORITIES | v |
| BRIEF OF RESPONDENT, THE TIMKEN COMPANY, IN OPPOSITION | 1 |
| CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED | 2 |
| STATEMENT OF THE CASE | 2 |
| REASONS WHY THE PETITION SHOULD BE DENIED | 6 |
| I. The Court of Appeals Could Not Err by Ignoring WTO Reports Which, By Law, Could Only Be Relevant To Later Imported Entries | 7 |

## TABLE OF CONTENTS – Continued

Page

II. The Court of Appeals Could Not Err by Ignoring WTO Reports Which the U.S. Could Choose to Ignore ..... 11

III. The Court of Appeals Could Not Err By Failing To Follow A WTO Decision Not Yet Adopted or Implemented by the U.S. ..... 12

IV. The Court of Appeals Had No Reason To Follow A WTO Decision Involving Conduct in Investigations When Considering the Correct Conduct For Administrative Reviews ..... 14

V. There Is No Conflict Among the Circuits Over the Proper Application of the *Charming Betsy* Canon ..... 16

CONCLUSION ..... 19

APPENDIX

## TABLE OF AUTHORITIES

Page

Cases

*Ali v. Ashcroft*, 346 F.3d 873 (9th Cir. 2003) ..... 16, 18

*Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837 (1984) ..... i, 16-19

*Foster and Elam v. Neilson*, 27 U.S. 253 (1829) ..... 4

*George E. Warren Corp. v. U.S. EPA*, 159 F.3d 616 (D.C. Cir. 1998), *amended on other grounds*, 164 F.3d 676 (D.C. Cir. 1999) ..... 16-18

*Murray* v. *The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804) ..... i, 6, 16-19

Statutes

Tariff Act of 1930, as amended:

19 U.S.C. § 1675(a) ..... 2, 3, 14

19 U.S.C. § 1675(c) ..... 2, 15

## TABLE OF AUTHORITIES – Continued

Page

Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 ..... 3

19 U.S.C. § 3533(g) ..... 2, 5, 6

19 U.S.C. § 3538(b) ..... 2, 5, 6, 13

19 U.S.C. § 3538(c)(1) ..... 2, 5, 9

WTO Dispute Settlement Decisions

*European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India,* WT/DS141/AB/R, adopted Mar. 1, 2001 ..... 8, 11, 14

*Japan – Taxes on Alcoholic Beverages,* WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted Nov. 1, 1996 ..... 12

*United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea,* WT/DS99/R, adopted March 19, 1999 .... 15

## TABLE OF AUTHORITIES – Continued

Page

*United States — Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/R (Apr. 13, 2004)..... 14

*United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R, issued Aug. 11, 2004 ..... 8, 11, 13, 14

*United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted Jan. 9, 2004 ..... 15

*United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/R, issued July 16, 2004 ..... 15

International Materials

*Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade*, Apr. 15, 1994, Marrakesh Agreement Establishing the WTO, Annex 1A, *reprinted in* H.R. Doc. No. 103-316, vol. I (1994) ..... 9, 14, 15

## TABLE OF AUTHORITIES – Continued

Page

International Materials - Continued

Joined Cases C-27/00 & C-210/00, *The Queen v. Secretary of State for the Environment, Transport and the Regions ex parte Omega Air Ltd; Omega Air Ltd. Aero Engines Ireland Ltd, Omega Aviation Services Ltd. v. Irish Aviation Authority*, 2002 E.C.R. I-2569 ..... 12

*Marrakesh Agreement Establishing the World Trade Organization* (Apr. 15, 1994), *reprinted in* H.R. Doc. No. 103-316, at 1327, vol. 1 (1994) ..... 4, 10

*Understanding on Rules and Procedures Governing the Settlement of Disputes*, Apr. 15, 1994, Marrakesh Agreement Establishing the WTO, Annex 2, *reprinted in* H.R. Doc. No. 103-316, vol. I, 1654 (1994) ..... 4, 5, 6, 10

## TABLE OF AUTHORITIES – Continued

Page

Administrative Determinations

*Certain Bearings from Hungary, Japan, Romania, Sweden, France, Germany, Italy, and the United Kingdom*, 65 Fed. Reg. 42667 (Dep't Commerce 2000) (revocation) ..... 8

*Issues and Decision Memorandum for the 1998-99 Administrative Review of Tapered Roller Bearings and Parts Thereof, Finished and Unfinished from Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, from Japan* (A-588-604/A-588-054) (final results) (Mar. 7, 2001) ..... 7, 14

IN THE
# Supreme Court of the United States

No. 04-87

KOYO SEIKO CO., LTD.
AND KOYO CORPORATION OF U.S.A.,
*Petitioners,*

*v.*

UNITED STATES OF AMERICA,
*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

## BRIEF OF RESPONDENT, THE TIMKEN COMPANY, IN OPPOSITION

Pursuant to United States Supreme Court Rule 15, Respondent, The Timken Company, hereby submits this brief in opposition to the petition for a writ of certiorari.

## CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

In addition to those identified in the Petition, the following statutory provisions are involved in this case (they are set forth in the Appendix at App.1-22).

1. 19 U.S.C. § 1675(a), (c).

2. 19 U.S.C. § 3533(g).

3. 19 U.S.C. § 3538(b), (c).

## STATEMENT OF THE CASE

The U.S. trade remedy laws provide remedies to domestic industries for unfair trade practices. Among those laws are the U.S. antidumping law. A domestic industry that has been harmed by imports of products sold at less than fair value ("dumped") in the U.S. can initiate an antidumping investigation by filing a petition with the U.S. Department of Commerce and the International Trade Commission. If the petition is in order, the two agencies will initiate investigations – Commerce will investigate allegations of dumping and the Commission allegations of harm to the U.S. industry.

At the conclusion of these investigations, if Commerce determines that the products have been dumped and the Commission determines that the domestic industry has been harmed thereby, the Commerce Department will issue an antidumping duty order on the product(s) covered by the petition.

This order results in the imposition of special duties (in addition to regular import duties) on the product(s) covered by the order. The amount of the duty is equivalent to the amount of dumping.

The U.S. has for many years calculated a weighted average dumping margin for a company or country by summing the amount of dumping found and dividing that number by the value of imports from the producer or country examined. Where certain imported sales were not dumped, no (or "zero") amount was added to the denominator.

After an antidumping duty order has been put in place, at the request of a foreign producer, importer, or member of the domestic industry, the Commerce Department will review later imports to determine whether dumping has continued and, if so, to what extent.[1] Such reviews typically cover products imported during a specific twelve-month period so that there may be many different reviews covering imports at different times that are conducted under a single order.

In 1994, the U.S. Congress passed legislation to implement U.S. obligations[2] (as the United States

---

[1] 19 U.S.C. § 1675(a).

[2] Uruguay Round Agreements Act of 1994, Pub. L. No. 103-465, 108 Stat. 4809 ("URAA"). The WTO Agreement is not a self-executing agreement. It has been implemented into U.S. law by the URAA.

understood them) under the WTO Agreement which incorporates a series of trade agreements that the U.S. and many other nations had agreed to in Marrakesh.[3] One of the those agreements creates the WTO Dispute Settlement Body ("DSB").[4] The DSB

---

Justice Marshall has explained the difference between self-executing and non-self-executing treaties:

> Our Constitution declares a Treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an Act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract – when either of the parties engages to perform a particular act – the treaty addresses itself to the political, not the judicial department; and the Legislature must execute the contract before it can become a rule for the court.

*Foster and Elam v. Neilson*, 27 U.S. 253, 314 (1829).

[3] *Marrakesh Agreement Establishing the World Trade Organization* (Apr. 15, 1994), *reprinted in* H.R. Doc. No. 103-316, at 1327, vol. 1 (1994) ("WTO Agreement").

[4] *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Apr. 15, 1994, Marrakesh Agreement Establishing the WTO, Annex

establishes panels that address disputes between Member states; the result of a panel's efforts is called a panel report. A panel report may be appealed to the Appellate Body; the result of such an appeal is called an Appellate Body report. The DSB then decides whether to adopt a report.

The U.S. legislation implementing the Agreements includes detailed provisions that specify how, if at all, the adverse findings of a WTO report regarding U.S. law or practice are to be implemented under U.S. law.

Under the WTO Agreement and under U.S. law, the United States may choose whether or not to implement the recommendations of a panel or Appellate Body report.[5] Under U.S. law, any change that the U.S. chooses to make in its antidumping or countervailing duty practice in response to a WTO panel or Appellate Body report under the WTO Antidumping Agreement or the Agreement on Subsidies and Countervailing Measures is prospective in nature so that it applies only to entries made on or after the date of the decision by the executive branch to make a change.[6]

---

2, *reprinted in* H.R. Doc. No. 103-316, vol. I, 1654 (1994) ("DSU").

[5] *See DSU*, Art. 22.1-2; 19 U.S.C. §§ 3533(g), 3538(b).

[6] *See* 19 U.S.C. § 3538(c)(1).

As provided for in U.S. legislation implementing the WTO Agreement, the U.S. executive branch, in consultation with the Congress, may choose a number of different responses to an adverse report, including: (a) doing nothing; (b) negotiating a resolution between the U.S. and the aggrieved WTO Member or Members; and (c) modifying U.S. law or practice to bring itself into conformity with its WTO obligations as construed by the WTO panel or Appellate Body.[7]

If it chooses to change its law or practice in response to a WTO panel or Appellate Body report, the U.S. will have a reasonable time to make the change.

## REASONS WHY THE PETITION SHOULD BE DENIED

Koyo's petition asserts that there are important issues of federal law raised by the challenged judicial review of U.S. law: (1) does the *Charming Betsy* canon of statutory interpretation require the Federal Circuit to interpret U.S. law in light of certain WTO dispute settlement reports; (2) does the Federal Circuit's decision conflict with the decisions of other circuit courts?

Whatever the merits of these issues, this is not the case for this Court to address them. The specific

---

[7] *See DSU,* Arts.3.7, 22.1-2; 19 U.S.C. §§ 3533(g), 3538(b).

imports giving rise to this litigation precede the WTO reports in time so that by U.S. statute they cannot be affected. The U.S. has no obligation to take any action in response to WTO dispute settlement reports. Should the U.S. choose to respond, it may consider what response to make. It will have time after the report's adoption to consider that response. The proceedings on appeal are reviews, not investigations.

## I. The Court of Appeals Could Not Err by Ignoring WTO Reports Which, By Law, Could Only Be Relevant To Later Imported Entries.

The administrative decisions of the Commerce Department that have been challenged by the petitioners cover imports of tapered roller bearings and parts from Japan during the period October 1, 1998 through September 30, 1999.[8] The antidumping duty order and finding covering tapered roller bear-

---

[8] *Issues and Decision Memorandum for the 1998-99 Administrative Review of Tapered Roller Bearings and Parts Thereof, Finished and Unfinished from Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, from Japan* (A-588-604/A-588-054) (final results of antidumping duty administrative reviews) (Mar. 7, 2001) (Pet. App. 120a) ("*Commerce Issues and Decision Memo*").

ings from Japan were revoked for all imports after December 31, 1999.[9]

There has been an adverse decision in a WTO case not involving U.S. law which found that a method for calculating dumping margins employing zeroing (during the investigation phase of an antidumping proceeding) was not in compliance with a WTO Member's obligations.[10] This report was not adopted until 2001, well after the imports of tapered roller bearings from Japan in 1998-99 and well after the antidumping duty order and finding covering those imports were revoked.

Another WTO dispute settlement proceeding that has considered the U.S. method of calculating dumping margins resulted in an Appellate Body report released on August 11, 2004.[11] That report

---

[9] *Certain Bearings from Hungary, Japan, Romania, Sweden, France, Germany, Italy, and the United Kingdom*, 65 Fed. Reg. 42,667 (Dep't Commerce 2000) (revocation), Opposition Appendix at App. 7.

[10] *European Communities — Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India* ("*EC — Bed Linen*"), WT/DS141/AB/R, adopted March 1, 2001.

[11] *United States — Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R (issued Aug. 11, 2004) ("*US — Softwood Lumber*"). The report has not yet been adopted

found Commerce's margin calculation methodology in an antidumping investigation to be contrary to U.S. obligations under the Antidumping Agreement.[12]

Under U.S. law,[13] adverse WTO panel and Appellate Body reports adopted by the DSB which the U.S. chooses to conform to that affect antidumping or countervailing duty determinations apply only to imports entered on or after the date the U.S. chooses to implement the adverse report.

Hence, assuming *arguendo* everything else petitioners claim, there was no basis for the Court of Appeals for the Federal Circuit to find Commerce's actions inconsistent with U.S. law simply by virtue of a subsequent WTO Appellate Body report. Thus, there is no theory under which the Court of Appeals could have erred by not considering as controlling WTO reports which by law, if relevant at all, could only be relevant for imports after a point in time

---

by the WTO's DSB; it is likely to be adopted within a month.

[12] The "Antidumping Agreement" is shorthand for one of the WTO Agreements, the *Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade,* Apr. 15, 1994, Marrakesh Agreement Establishing the WTO, Annex 1A, *reprinted in* H.R. Doc. No. 103-316, vol. I (1994).

[13] 19 U.S.C. § 3538(c)(1). *See* Opp. Appendix at App. 21-22.

which is at least after the date of the WTO Appellate Body report's adoption.

Stated differently, petitioners lose even assuming *arguendo*:

- WTO Appellate Body reports that are not against the United States nonetheless control U.S. construction of its laws, regulations and practices once rendered;

- if it were to choose to adopt an adverse determination, the United States' right to a reasonable period of time to implement adverse rulings was not applicable in this case;

- the U.S. right under the DSU[14] not to implement adverse determinations where it chooses not to do so somehow does not relieve it of the asserted obligation to conform its construction of U.S. law, regulations and practice with WTO Appellate Body reports; and

- WTO Appellate Body reports in unrelated cases involving investigations are binding on the U.S. in its conduct of administrative reviews.

Not surprisingly, the petitioners are silent on this fundamental infirmity in their challenge.

---

[14] Art. 22.1-2.

As Timken reviews below, none of the four assumptions above is valid. This further demonstrates why there is no basis to examine the Court of Appeals review of the Commerce Department action because of one or more WTO Appellate Body reports.

## II. The Court of Appeals Could Not Err by Ignoring WTO Reports Which the U.S. Could Choose to Ignore.

As we have seen, the United States, along with all other members of the WTO, reserved the right to determine how to act following an adverse panel or Appellate Body report, including the right not to adopt an adverse determination

Thus, assuming *arguendo* that there was an adverse determination directly relevant to the factual situation involved in this petition, the U.S. is under no obligation to conform to it. As petitioners must acknowledge, the U.S. has taken no action to modify U.S. regulation or practice to implement the adverse determination(s)[15] cited by Koyo (and indeed the second decision has not yet been adopted by the WTO's DSB and the reasonable period of time to implement, if the U.S. chooses to implement, has not yet been identified or run).

In such a situation, there can be no basis for finding that a construction of the WTO obligations

---

[15] *EC — Bed Linen* and *US — Softwood Lumber*.

which the U.S. is not required to implement controls whether or not the agency in question construed U.S. law correctly.[16] Thus, this petition for *certiorari* should be denied.

### III. The Court of Appeals Could Not Err By Failing To Follow A WTO Decision Not Yet Adopted or Implemented by the U.S.

Only one of the two WTO findings relied on by petitioners involved the United States practice of "zeroing": the decision of the Appellate Body in *US – Softwood Lumber*.[17] That finding was rendered on

---

[16] The Court of Justice for the European Communities has held that it is not bound by the WTO agreements, saying "to require the judicial organs to refrain from applying rules of domestic law which are inconsistent with the WTO agreements would have the consequence of depriving the legislative or executive organs of the contracting parties of the possibility of finding negotiated solutions, even on a temporary basis." Joined Cases C-27/00 & C-210/00, *The Queen v. Secretary of State for the Environment, Transport and the Regions ex parte Omega Air Ltd; Omega Air Ltd. Aero Engines Ireland Ltd, Omega Aviation Services Ltd. v. Irish Aviation Authority*, 2002 E.C.R. I-2569, ¶¶ 89-90.

[17] The WTO Appellate Body has explained that adopted reports "are not binding, except with respect to resolving the particular dispute between the parties to that dispute." *See Japan – Taxes on Alcoholic*

August 11, 2004 and has not as yet been adopted by the WTO Dispute Settlement Body. Once adopted, the U.S. will have a reasonable amount of time (generally six months to fifteen months) to implement the adverse ruling (again, if it chooses to implement versus doing nothing or paying compensation, etc.).

U.S. law identifies the steps that are to be taken where the executive branch is desirous of implementing an adverse ruling in an antidumping investigation or review.[18] Even if we assume *arguendo* that the August 11, 2004 *US — Softwood Lumber* decision is potentially relevant to the underlying fact situation, it provides no basis for a writ of certiorari.

The decision has neither been adopted nor has the reasonable period of time for implementation run, and U.S. statutory requirements for considering a modification have not been fulfilled. Indeed, the AB decision had not been rendered at the time of the Court of Appeals decision. Thus, there is no basis for finding that the Court of Appeals erred because it upheld the Commerce Department's construction of U.S. law without regard for a WTO decision not yet adopted or implemented by specific U.S. action.

---

*Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted Nov. 1, 1996, Section E.

[18] 19 U.S.C. § 3538(b).

## IV. The Court of Appeals Had No Reason To Follow A WTO Decision Involving Conduct in Investigations When Considering the Correct Conduct For Administrative Reviews.

Koyo relies on one adopted WTO Appellate Body report (*EC — Bed Linen)* and one panel report that was still pending appeal at the time that it filed its petition[19] finding "zeroing" during investigations to be inconsistent with Article 2.4.2 of the Antidumping Agreement. Pet. 9-10, 15-16. Neither of these decisions pertains to what is permissible conduct in administrative reviews. The proceedings here on appeal were administrative reviews, not investigations.[20]

Prior WTO Appellate Body decisions and panel reports have found obligations relevant to investigations may not be relevant to reviews.[21]

---

[19] *United States — Final Dumping Determination on Softwood Lumber from Canada,* WT/DS264/R (Apr. 13, 2004).

[20] *See Commerce Issues and Decision Memorandum*, Pet. App. 120a.

[21] Under the Antidumping Agreement, the administering authority can conduct various types of reviews of imports subject to an antidumping duty order, including what are called "administrative reviews" (Art. 9.3) and "sunset reviews" (Art. 11.3) in the United States. *See* 19 U.S.C. §§ 1675(a) &

Thus, even assuming *arguendo* that courts should construe U.S. law to be consistent with WTO decisions regardless of whether the U.S. has chosen to implement an adverse ruling, there is no basis for a writ of certiorari.

---

1675(c). WTO panels and the Appellate Body have recognized that provisions in the Antidumping Agreement distinguish between the investigation and review phases of antidumping proceedings and can be limited to one or the other. *See United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea*, WT/DS99/R, adopted March 19, 1999, paras. 6.83-91 (Article 5.8 *de minimis* requirement in investigations does not apply to Article 9.3 reviews); *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted Jan. 9, 2004, paras. 106-07 ("'original investigations and sunset reviews are distinct processes with different purposes'"); *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/R, issued July 16, 2004, paras. 7.190-91 (Articles 3.7 and 3.8 injury requirements do not apply to Article 11.3 sunset reviews). Commerce's determination at issue in this case was made in the context of an administrative, not a sunset, review.

Since the reports relied on by Koyo pertain to conduct in investigations and not to conduct in administrative reviews, there is no basis for finding that the Court of Appeals erred in upholding the Commerce Department's construction of U.S. law. Commerce had no reason to follow any WTO decision(s) involving conduct in investigations when considering the correct conduct for administrative reviews.

## V. There Is No Conflict Among the Circuits Over the Proper Application of the *Charming Betsy* Canon.

Petitioners assert that there is a conflict among the circuits "over the role of the *Charming Betsy* canon in cases that involve *Chevron* review of agency interpretations." Pet. 18. In particular, petitioners claim that the Federal Circuit's decision below conflicts with a decision of the D.C. Circuit, *George E. Warren Corp. v. U.S. EPA*, 159 F.3d 616 (D.C. Cir. 1998), *amended on other grounds*, 164 F.3d 676 (D.C. Cir. 1999), and a decision of the Ninth Circuit, *Ali v. Ashcroft*, 346 F.3d 873 (9th Cir. 2003). Petitioners' asserted conflict does not exist.

Review of the cited cases shows that no conflict exists. In neither case did the court rely on the *Charming Betsy* canon to reject an agency's interpretation of an ambiguous statute that conflicted with U.S. international obligations. Rather, the courts in the cited circuit decisions applied *Chevron* prong-two analysis to an agency's statutory interpretation. Ref-

erences to the *Charming Betsy* canon in the cited decisions were merely collateral.

Rather than reflect a conflict, the D.C. Circuit's decision in *Warren* actually illustrates the workings of the statutory scheme established by Congress to address adverse WTO panel and Appellate Body reports. The *Warren* decision shows how the U.S. follows the statutory scheme for responding to an adverse WTO panel or Appellate Body report when it chooses to comply with the report's recommendations.

The *Warren* case concerned the Environmental Protection Agency's (EPA) promulgation of regulations regarding standards for reformulated gasoline. The EPA's initial rule (1994) was found by a WTO panel and Appellate Body to be inconsistent with U.S. obligations under the General Agreement on Tariffs and Trade (GATT) because it discriminated against imported gasoline. Following the Appellate Body report, the United States decided to comply with the DSB's recommendations, and, following the statutory scheme, the EPA issued a new regulation (1997) after conducting a rulemaking proceeding.

In *Warren,* the court held that the EPA's issuance of the new regulation was reasonable and permissible under the relevant statute and, therefore, accorded *Chevron* "prong two" deference to the EPA's regulation. *Warren*, 159 F.3d at 623-24. The court noted that while the WTO report "in the background" "bolstered" the court's determination to uphold the EPA's regulation, the *Charming Betsy* canon played

no role in the court's *Chevron* analysis. *Warren*, 159 F.3d at 624.

So also, no conflict exists between the appeals court decision below and the decision of the Ninth Circuit in *Ali v. Ashcroft*, 346 F.3d 873 (9th Cir. 2003). In that case, the Immigration and Naturalization Service (INS) claimed statutory and regulatory authority to remove aliens to countries that did not have functioning governments to accept them. Applying a *Chevron-two* analysis, the court held that the INS' position was not authorized by statute nor supported by either INS policy or regulations. *Ali v. Ashcroft*, 346 F.3d at 881-882, 884-885.

Therefore, because the government's position was inconsistent with existing INS policy and regulations, the court held that the government's proposed construction of the statute was not entitled to *Chevron* deference. *Ali v. Ashcroft*, 346 F.3d at 885. The court's holding was based upon a review of the relevant statute, regulations and INS policy. The *Charming Betsy* canon played no role in the court's *Chevron* analysis. All the court said in that respect was that its construction of the statute was further supported by its being consistent with international law. *Ali v. Ashcroft*, 346 F.3d at 885.

In the cases cited by petitioners, as in the appeals court decision below, the courts similarly applied a *Chevron-two* analysis to agency action without regard to the *Charming Betsy* canon. Thus, these circuit decisions are not in conflict with respect to

application of the *Charming Betsy* canon in the context of a *Chevron* analysis of agency action.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

TERENCE P. STEWART
*Counsel of Record*
WILLIAM A. FENNELL
PATRICK J. MCDONOUGH
AMY S. DWYER
STEWART AND STEWART
2100 M STREET, NW
WASHINGTON, DC 20037
(202) 785-4185
*Counsel for Respondent,*
*The Timken Company*

Dated: August 19, 2004

## Statutory Provisions

### 19 U.S.C. § 1675. Administrative review of determinations

#### (a) Periodic review of amount of duty

##### (1) In general

At least once during each 12-month period beginning on the anniversary of the date of publication of a countervailing duty order under this subtitle or under section 1303 of this title, an antidumping duty order under this subtitle or a finding under the Antidumping Act, 1921, or a notice of the suspension of an investigation, the administering authority, if a request for such a review has been received and after publication of notice of such review in the Federal Register, shall--

(A) review and determine the amount of any net countervailable subsidy,

(B) review, and determine (in accordance with paragraph (2)), the amount of any antidumping duty, and

(C) review the current status of, and compliance with, any agreement by reason of which an investigation was suspended, and review the amount of any net countervailable subsidy or dumping margin involved in the agreement,

and shall publish in the Federal Register the results of such review, together with notice of any duty to be assessed, estimated duty to be deposited, or investigation to be resumed.

**(2) Determination of antidumping duties**

(A) In general

For the purpose of paragraph (1)(B), the administering authority shall determine--

(i) the normal value and export price (or constructed export price) of each entry of the subject merchandise, and

(ii) the dumping margin for each such entry.

(B) Determination of antidumping or countervailing duties for new exporters and producers

(i) In general

If the administering authority receives a request from an exporter or producer of the subject merchandise establishing that--

(I) such exporter or producer did not export the merchandise that was the subject of

an antidumping duty or countervailing duty order to the United States (or, in the case of a regional industry, did not export the subject merchandise for sale in the region concerned) during the period of investigation, and

(II) such exporter or producer is not affiliated (within the meaning of section 1677(33) of this title) with any exporter or producer who exported the subject merchandise to the United States (or in the case of a regional industry, who exported the subject merchandise for sale in the region concerned) during that period,

the administering authority shall conduct a review under this subsection to establish an individual weighted average dumping margin or an individual countervailing duty rate (as the case may be) for such exporter or producer.

(ii) Time for review under clause (i)

The administering authority shall commence a review under clause (i) in the calendar month beginning after--

(I) the end of the 6-month period beginning on the date of the countervailing duty or anti-dumping duty order under review, or

(II) the end of any 6-month period occurring thereafter,

if the request for the review is made during that 6-month period.

(iii) Posting bond or security

The administering authority shall, at the time a review under this subparagraph is initiated, direct the Customs Service to allow, at the option of the importer, the posting, until the completion of the review, of a bond or security in lieu of a cash deposit for each entry of the subject merchandise.

(iv) Time limits

The administering authority shall make a preliminary determination in a review conducted under this subparagraph within 180 days after the date on which the review is initiated, and a final determination within 90 days after the date the preliminary determination is issued, except that if the administering authority concludes that the case is ex-

traordinarily complicated, it may extend the 180-day period to 300 days and may extend the 90-day period to 150 days.

(C) Results of determinations

The determination under this paragraph shall be the basis for the assessment of countervailing or antidumping duties on entries of merchandise covered by the determination and for deposits of estimated duties.

**(3) Time limits**

(A) Preliminary and final determinations

The administering authority shall make a preliminary determination under subparagraph (A), (B), or (C) of paragraph (1) within 245 days after the last day of the month in which occurs the anniversary of the date of publication of the order, finding, or suspension agreement for which the review under paragraph (1) is requested, and a final determination under paragraph (1) within 120 days after the date on which the preliminary determination is published. If it is not practicable to complete the review within the foregoing time, the administering authority may extend that 245-day period to 365 days and may extend that 120-day period to 180 days. The administering authority may extend the time for making a final determination without extending

the time for making a preliminary determination, if such final determination is made not later than 300 days after the date on which the preliminary determination is published.

(B) Liquidation of entries

If the administering authority orders any liquidation of entries pursuant to a review under paragraph (1), such liquidation shall be made promptly and, to the greatest extent practicable, within 90 days after the instructions to Customs are issued. In any case in which liquidation has not occurred within that 90-day period, the Secretary of the Treasury shall, upon the request of the affected party, provide an explanation thereof.

(C) Effect of pending review under section 1516a

In a case in which a final determination under paragraph (1) is under review under section 1516a of this title and a liquidation of entries covered by the determination is enjoined under section 1516a(c)(2) of this title or suspended under section 1516a(g)(5)(C) of this title, the administering authority shall, within 10 days after the final disposition of the review under section 1516a of this title, transmit to the Federal Register for publication the final disposition and issue instructions to the Customs Service with respect to the liquidation of entries pursuant to the review. In such a case,

the 90-day period referred to in subparagraph (B) shall begin on the day on which the administering authority issues such instructions.

**(4) Absorption of antidumping duties**

During any review under this subsection initiated 2 years or 4 years after the publication of an antidumping duty order under section 1673e(a) of this title, the administering authority, if requested, shall determine whether antidumping duties have been absorbed by a foreign producer or exporter subject to the order if the subject merchandise is sold in the United States through an importer who is affiliated with such foreign producer or exporter. The administering authority shall notify the Commission of its findings regarding such duty absorption for the Commission to consider in conducting a review under subsection (c) of this section.

* * *

**(c) Five-year review**

**(1) In general**

Notwithstanding subsection (b) of this section and except in the case of a transition order defined in paragraph (6), 5 years after the date of publication of--

(A) a countervailing duty order (other than a countervailing duty order to which subparagraph (B) applies or which was issued without an affirmative determination of injury

by the Commission under section 1303 of this title), an antidumping duty order, or a notice of suspension of an investigation, described in subsection (a)(1) of this section,

(B) a notice of injury determination under section 1675b of this title with respect to a countervailing duty order, or

(C) a determination under this section to continue an order or suspension agreement,

the administering authority and the Commission shall conduct a review to determine, in accordance with section 1675a of this title, whether revocation of the countervailing or antidumping duty order or termination of the investigation suspended under section 1671c or 1673c of this title would be likely to lead to continuation or recurrence of dumping or a countervailable subsidy (as the case may be) and of material injury.

**(2) Notice of initiation of review**

Not later than 30 days before the fifth anniversary of the date described in paragraph (1), the administering authority shall publish in the Federal Register a notice of initiation of a review under this subsection and request that interested parties submit--

(A) a statement expressing their willingness to participate in the review by provid-

ing information requested by the administering authority and the Commission,

(B) a statement regarding the likely effects of revocation of the order or termination of the suspended investigation, and

(C) such other information or industry data as the administering authority or the Commission may specify.

**(3) Responses to notice of initiation**

(A) No response

If no interested party responds to the notice of initiation under this subsection, the administering authority shall issue a final determination, within 90 days after the initiation of a review, revoking the order or terminating the suspended investigation to which such notice relates. For purposes of this paragraph, an interested party means a party described in section 1677(9)(C), (D), (E), (F), or (G) of this title.

(B) Inadequate response

If interested parties provide inadequate responses to a notice of initiation, the administering authority, within 120 days after the initiation of the review, or the Commission, within 150 days after such initiation, may issue, without further investigation, a final de-

termination based on the facts available, in accordance with section 1677e of this title.

**(4) Waiver of participation by certain interested parties**

(A) In general

An interested party described in section 1677(9)(A) or (B) of this title may elect not to participate in a review conducted by the administering authority under this subsection and to participate only in the review conducted by the Commission under this subsection.

(B) Effect of waiver

In a review in which an interested party waives its participation pursuant to this paragraph, the administering authority shall conclude that revocation of the order or termination of the investigation would be likely to lead to continuation or recurrence of dumping or a countervailable subsidy (as the case may be) with respect to that interested party.

**(5) Conduct of review**

(A) Time limits for completion of review

Unless the review has been completed pursuant to paragraph (3) or paragraph (4) applies, the administering authority shall make its final determination pursuant to sec-

tion 1675a(b) or (c) of this title within 240 days after the date on which a review is initiated under this subsection. If the administering authority makes a final affirmative determination, the Commission shall make its final determination pursuant to section 1675a(a) of this title within 360 days after the date on which a review is initiated under this subsection.

(B) Extension of time limit

The administering authority or the Commission (as the case may be) may extend the period of time for making their respective determinations under this subsection by not more than 90 days, if the administering authority or the Commission (as the case may be) determines that the review is extraordinarily complicated. In a review in which the administering authority extends the time for making a final determination, but the Commission does not extend the time for making a determination, the Commission's determination shall be made not later than 120 days after the date on which the final determination of the administering authority is published.

(C) Extraordinarily complicated

For purposes of this subsection, the administering authority or the Commission (as the case may be) may treat a review as extraordinarily complicated if--

(i) there is a large number of issues,

(ii) the issues to be considered are complex,

(iii) there is a large number of firms involved,

(iv) the orders or suspended investigations have been grouped as described in subparagraph (D), or

(v) it is a review of a transition order.

(D) Grouped reviews

The Commission, in consultation with the administering authority, may group orders or suspended investigations for review if it considers that such grouping is appropriate and will promote administrative efficiency. Where orders or suspended investigations have been grouped, the Commission shall, subject to subparagraph (B), make its final determination under this subsection not later than 120 days after the date that the administering authority publishes notice of its final determination with respect to the last order or agreement in the group.

**(6) Special transition rules**

(A) Schedule for reviews of transition orders

(i) Initiation

The administering authority shall begin its review of transition orders in the 42d calendar month after the date such orders are issued. A review of all transition orders shall be initiated not later than the 5th anniversary after the date such orders are issued.

(ii) Completion

A review of a transition order shall be completed not later than 18 months after the date such review is initiated. Reviews of all transition orders shall be completed not later than 18 months after the 5th anniversary of the date such orders are issued.

(iii) Subsequent reviews

The time limits set forth in clauses (i) and (ii) shall be applied to all subsequent 5-year reviews of transition orders by substituting "date of the determination to continue such orders" for "date such orders are issued".

(iv) Revocation and termination

No transition order may be revoked under this subsection before the date that is 5 years after the date the WTO Agreement enters into force with respect to the United States.

(B) Sequence of transition reviews

The administering authority, in consultation with the Commission, shall determine such sequence of review of transition orders as it deems appropriate to promote administrative efficiency. To the extent practicable, older orders shall be reviewed first.

(C) "Transition order" defined

For purposes of this section, the term "transition order" means--

(i) a countervailing duty order under this subtitle or under section 1303 of this title,

(ii) an antidumping duty order under this subtitle or a finding under the Antidumping Act, 1921, or

(iii) a suspension of an investigation under section 1671c or 1673c of this title,

which is in effect on the date the WTO Agreement enters into force with respect to the United States.

(D) Issue date for transition orders

For purposes of this subsection, a transition order shall be treated as issued on the date the WTO Agreement enters into force with respect to the United States, if such order is based on an investigation conducted by both the administering authority and the Commission.

**(7) Exclusions from computations**

(A) In general

Subject to subparagraph (B), there shall be excluded from the computation of the 5-year period described in paragraph (1) and the periods described in paragraph (6) any period during which the importation of the subject merchandise is prohibited on account of the imposition, under the International Emergency Economic Powers Act [50 U.S.C.A. § 1701 et seq.] or other provision of law, of sanctions by the United States against the country in which the subject merchandise originates.

(B) Application of exclusion

Subparagraph (A) shall apply only with respect to subject merchandise which originates in a country that is not a WTO member.

* * *

(June 17, 1930, c. 497, Title VII, § 751, as added July 26, 1979, Pub.L. 96- 39, Title I, § 101, 93 Stat. 175, and amended Oct. 30, 1984, Pub.L. 98-573, Title VI, § 611(a)(2), (3), 98 Stat. 3031; Oct. 22, 1986, Pub.L. 99-514, Title XVIII, § 1886(a)(8), 100 Stat. 2922; Aug. 23, 1988, Pub.L. 100-418, Title I, § 1333(b), 102 Stat. 1209; Dec. 8, 1994, Pub.L. 103-465, Title II, §§ 220(a), 283(c), 108 Stat. 4857, 4930; Pub.L. 106-36, Title II, § 2410, June 25, 1999, 113 Stat. 171.)

## 19 U.S.C. § 3533. Dispute settlement panels and procedures

* * *

### (g) Requirements for agency action

#### (1) Changes in agency regulations or practice

In any case in which a dispute settlement panel or the Appellate Body finds in its report that a regulation or practice of a department or agency of the United States is inconsistent with any of the Uruguay Round Agreements, that regulation or practice may not be amended, rescinded, or otherwise modified in the implementation of such report unless and until—

(A) the appropriate congressional committees have been consulted under subsection (f) of this section;

(B) the Trade Representative has sought advice regarding the modification from relevant private sector advisory committees established under section 2155 of this title;

(C) the head of the relevant department or agency has provided an opportunity for public comment by publishing in the Federal Register the proposed modification and the explanation for the modification;

(D) the Trade Representative has submitted to the appropriate congressional committees a report describing the proposed modification, the reasons for the modification, and a summary of the advice obtained under subparagraph (B) with respect to the modification;

(E) the Trade Representative and the head of the relevant department or agency have consulted with the appropriate congressional committees on the proposed contents of the final rule or other modification; and

(F) the final rule or other modification has been published in the Federal Register.

**(2) Effective date of modification**

A final rule or other modification to which paragraph (1) applies may not go into effect before the end of the 60-day period beginning on the date on which consultations under paragraph (1)(E) begin, unless the President determines that an earlier effective date is in the national interest.

**(3) Vote by congressional committees**

During the 60-day period described in paragraph (2), the Committee on Ways and Means of the House of Representatives and the Committee on Finance of the Senate may vote to indicate the agreement or disagreement of the committee with the proposed contents of the final rule or other modification. Any such vote shall not be binding on the depart-

ment or agency which is implementing the rule or other modification.

**(4) Inapplicability to ITC**

This subsection does not apply to any regulation or practice of the International Trade Commission.

* * *

(Pub. L. 103-465, title I, Sec. 123, Dec. 8, 1994, 108 Stat. 4830.)

**19 U.S.C. § 3538. Administrative action following WTO panel reports**

* * *

**(b) Action by administering authority**

**(1) Consultations with administering authority and congressional committees**

Promptly after a report by a dispute settlement panel or the Appellate Body is issued that contains findings that an action by the administering authority in a proceeding under title VII of the Tariff Act of 1930 [19 U.S.C. 1671 et seq.] is not in conformity with the obligations of the United States under the Antidumping Agreement or the Agreement on Subsidies and Countervailing Measures, the Trade Representative shall consult with the administering authority and the congressional committees on the matter.

**(2) Determination by administering authority**

Notwithstanding any provision of the Tariff Act of 1930 [19 U.S.C. 1202 et seq.], the administering authority shall, within 180 days after receipt of a written request from the Trade Representative, issue a determination in connection with the particular proceeding that would render the administering authority's action described in paragraph (1) not inconsistent with the findings of the panel or the Appellate Body.

**(3) Consultations before implementation**

Before the administering authority implements any determination under paragraph (2), the Trade Representative shall consult with the administering authority and the congressional committees with respect to such determination.

**(4) Implementation of determination**

The Trade Representative may, after consulting with the administering authority and the congressional committees under paragraph (3), direct the administering authority to implement, in whole or in part, the determination made under paragraph (2).

**(c) Effects of determinations; notice of implementation**

**(1) Effects of determinations**

Determinations concerning title VII of the Tariff Act of 1930 [19 U.S.C. A. § 1671 *et seq.*] that are implemented under this section shall apply with respect to unliquidated entries of the subject merchandise (as defined in section 771 of that Act [19 U.S.C.A. § 1677]) that are entered, or withdrawn from warehouse, for consumption on or after-

(A) in the case of a determination by the Commission under subsection (a)(4) of this section, the date on which the Trade Representative directs the administering authority

under subsection (a)(6) of this section to revoke an order pursuant to that determination, and

(B) in the case of a determination by the administering authority under subsection (b)(2) of this section, the date on which the Trade Representative directs the administering authority under subsection (b)(4) of this section to implement that determination.

* * *

(Pub. L. 103-465, title I, Sec. 129, Dec. 8, 1994, 108 Stat. 4836.)

***Certain Bearings from Hungary, Japan, Romania, Sweden, France, Germany, Italy, and the United Kingdom***
**65 Fed. Reg. 42667 (Dep't Commerce 2000)**
**(Revocation)**

**DEPARTMENT OF COMMERCE, International Trade Administration [A-437-601 (TRBs/ Hungary); et al.)]**

**Revocation of Antidumping Duty Orders on Certain Bearings From Hungary, Japan, Romania, Sweden, France, Germany, Italy, and the United Kingdom**

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of revocation of antidumping duty orders on certain bearings from Hungary, Japan, Romania, Sweden, France, Germany, Italy, and the United Kingdom.

SUMMARY: On November 4, 1999, the Department of Commerce (``the Department''), pursuant to sections 751(c) and 752 of the Tariff Act of 1930, as amended (``the Act''), determined that revocation of the following antidumping duty orders on certain bearings from Hungary, Japan, Romania, Sweden, France, Germany, Italy, and the United Kingdom would be likely to lead to continuation or recurrence of dumping:

| Product | Country | ITA case no. | FR cite |
|---|---|---|---|
| Tapered roller bearings | Hungary | A-437-601 | 64 FR 60272 |
| Tapered roller bearings (4 inches and under) | Japan | A-588-054 | 64 FR 60317 |
| Tapered roller bearings (Over 4 inches) | Japan | A-588-604 | 64 FR 60266 |
| Tapered roller bearings | Romania. | A-485-602 | 64 FR 60269 |
| Ball bearings | Romania | A-485-801 | 64 FR 60313 |
| Ball bearings | Sweden | A-401-801 | 64 FR 60282 |
| Cylindrical roller bearings | France | A-427-801 | 64 FR 60321 |
| Cylindrical roller bearings | Germany | A-428-801 | 64 FR 60309 |
| Cylindrical roller bearings | Italy | A-475-801 | 64 FR 60291 |
| Cylindrical roller bearings | Japan | A-588-804 | 64 FR 60275 |
| Cylindrical roller bearings | Sweden | A-401-801 | 64 FR 60321 |
| Cylindrical roller bearings | United Kingdom | A-412-801 | 64 FR 60326 |
| Spherical plain bearings | Germany | A-428-801 | 64 FR 60309 |
| Spherical plain bearings | Japan | A-588-804 | 64 FR 60275 |

On June 28, 2000, the International Trade Commission (``the Commission''), pursuant to section

751(c) of the Act, determined that revocation of the above antidumping duty orders on certain bearings from Hungary, Japan, Romania, Sweden, France, Germany, Italy, and the United Kingdom would not be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time (65 FR 39925). Therefore, pursuant to 19 CFR 351.222(i)(1), the Department is publishing notice of the revocation of the antidumping duty orders on certain bearings from Hungary, Japan, Romania, Sweden, France, Germany, Italy, and the United Kingdom.

Effective Date: January 1, 2000.

FOR FURTHER INFORMATION CONTACT: Kathryn B. McCormick or James Maeder, Office of Policy for Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Ave., NW., Washington, DC 20230; telephone: (202) 482-1930 or (202) 482-3330, respectively.

SUPPLEMENTARY INFORMATION:

Background

On April 1, 1999, the Department initiated, and the Commission instituted, sunset reviews (64 FR 15727 and 64 FR 15783, respectively) of the antidumping duty orders on certain bearings from Hungary, Japan, Romania, Sweden, France, Germany, Italy, and the United Kingdom. As a result of its reviews, the Department found that revocation of the

antidumping duty orders would likely lead to continuation or recurrence of dumping, and notified the Commission of the magnitude of the margins were the orders revoked. (See list below.)

On June 28, 2000, the Commission determined, pursuant to section 751(c) of the Act, that revocation of the antidumping duty orders on certain bearings from Hungary, Japan, Romania, Sweden, France, Germany, Italy, and the United Kingdom would not be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time (see Certain Bearings form China, France, Germany, Hungary, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom, 65 FR 39925, and USITC Publication 3309 (June 2000), Investigation Nos. AA-1921-143, 731-TA-341, 731-TA-343-345, 731-TA-391-397, and 731-TA-399 (Review)).

Scope of the Orders

These orders cover shipments of certain bearings from Hungary, Japan, Romania, Sweden, France, Germany, Italy, and the United Kingdom as described in the Appendix.

Determination

As a result of the determinations by the Commission that revocation of the antidumping duty orders would not be likely to lead to continuation or recurrence of dumping and material injury to an industry in the United States, pursuant to section

751(d)(2) of the Act, the Department hereby orders the revocation of the antidumping duty orders on certain bearings from Hungary, Japan, Romania, Sweden, France, Germany, Italy, and the United Kingdom. The Department will instruct the Customs Service to discontinue suspension of liquidation and collection of cash deposits on entries of subject merchandise entered or withdrawn from warehouse on or after January 1, 2000 (the effective date). The Department will complete any pending administrative reviews of these orders and will conduct administrative reviews of subject merchandise entered prior to the effective date of revocation in response to appropriately filed requests for review.

Dated: July 5, 2000.

Troy H. Cribb, Acting Assistant Secretary for Import Administration.

Appendix

A. Description of the Merchandise

1. Tapered Roller Bearings (``TRBs'')

a. Hungary: The products subject to this order are shipments of TRBs and parts thereof, finished and unfinished, from Hungary. This merchandise is currently classifiable under the following item numbers of the Harmonized Tariff Schedule (``HTS'') of the United States: 8482.00.10, 8482.20.00,8482.20.00.30, 8482.20.00.40, 8482.20.00.50, 8482.20.00.60, 8482.20.00.70,

8482.20.00.80, 8483.20.40.80, 8483.20.80.80, 8483.30.80.20, 8482.91.00.50, 8482.99.15.00, 8482.99.15.40, 8482.99.15.80, 8708.99.80.15, and 8708.99.80.80. The HTS numbers are provided for convenience and customs purposes. The written description remains dispositive.

b. Japan (four inches or less): Imports covered by the A-588-054 findings are sales or entries of TRBs, four inches or less in outside diameter when assembled, including inner race or cone assemblies and outer races or cups, sold either as a unit or separately. This merchandise is classified under HTS numbers 8482.20.00 and 8482.99.30. The HTS item numbers listed above are provided for convenience and customs purposes. The written descriptions remain dispositive.

c. Japan (over four inches): Imports covered by the A-588-604 order include TRBs and parts thereof, finished and unfinished, which are flange, take-up cartridge, and hanger units incorporating TRBs, and tapered roller housings (except pillow blocks) incorporating tapered rollers, with or without spindles, whether or not for automotive use. Products subject to the A-588-054 findings are not included within the scope of this order, except for those manufactured by NTN Corporation. This merchandise is currently classifiable under HTS item numbers 8482.99.30, 8483.20.40, 8482.20.20, 8483.20.80, 8482.91.00, 8483.30.80, 8483.90.20, 8483.90.30, and 8483.90.60. In addition, in accordance with our February 2, 1995, final scope determination regarding Koyo Seiko's rough forgings, Koyo's rough forgings are also included within the scope of this order. The HTS item numbers listed above for the A-588-604 or-

der are provided for convenience and customs purposes. The written descriptions remain dispositive.

d. Romania: The products subject to this order are TRBs, including flange, take-up cartridge, and hanger units incorporating tapered roller bearings, and tapered roller housings (except pillow blocks) incorporating tapered rollers, with or without spindles, whether or not for automotive use. This merchandise is currently classifiable under HTS item numbers 8482.20.00.10, 8482.20.00.20. 8482.20.00.30, 8482.20.00.50, 8482.20.00.60, 8482.20.00.70, 8482.20.00.80, 8482.91.00.50, 8482.99.15.00, 8482.99.15.40, 8482.99.15.80, 8483.20.40.80, 8483.20.80.80, 8483.30.80.20, 8708.99.80.15, and 8708.99.80.80.

2. Antifriction Bearings (``AFBs'')

The AFBs (other than TRBs) covered by these orders, mounted or unmounted, and parts thereof, constitute the following three types of subject merchandise:

a. Ball Bearings and Parts Thereof: These products include all AFBs that employ balls as the roller element. Imports of these products are classified under the following categories: antifriction balls, ball bearings with integral shafts, ball bearings (including radial ball bearings) and parts thereof, and housed or mounted ball bearing units and parts thereof. Imports of these products are classified under the following Harmonized Tariff Schedule (HTS) subheadings: 3926.90.45, 4016.93.00, 4016.93.10, 4016.93.50, 6909.19.5010, 8431.20.00, 8431.39.0010, 8482.10.10, 8482.10.50, 8482.80.00, 8482.91.00,

8482.99.05,8482.99.35, 8482.99.2580, 8482.99.6595, 8483.20.40, 8483.20.80, 8483.50.8040, 8483.50.90, 8483.90.20, 8483.90.30, 8483.90.70, 8708.50.50, 8708.60.50, 8708.60.80, 8708.70.6060, 8708.70.8050, 8708.93.30, 8708.93.5000, 8708.93.6000, 8708.93.75, 8708.99.06, 8708.99.31, 8708.99.4960, 8708.99.50, 8708.99.5800, 8708.99.8080, 8803.10.00, 8803.20.00, 8803.30.00, 8803.90.30, and 8803.90.90.

b. Cylindrical Roller Bearings, Mounted or Unmounted, and Parts Thereof: These products include all AFBs that employ cylindrical rollers as the rolling element. Imports of these products are classified under the following categories: antifriction rollers, all cylindrical roller bearings (including split cylindrical roller bearings) and parts thereof, housed or mounted cylindrical roller units and parts thereof.

Imports of these products are classified under the following HTS subheadings: 3926.90.45, 4016.93.00, 4016.93.10, 4016.93.50, 6909.19.5010, 8431.20.00, 8431.39.0010, 8482.40.00, 8482.50.00, 8482.80.00, 8482.91.00, 8482.99.25, 8482.99.35, 8482.99.6530, 8482.99.6560, 8482.99.70, 8483.20.40, 8483.20.80, 8483.50.8040, 8483.90.20, 8483.90.30, 8483.90.70, 8708.50.50, 8708.60.50, 8708.93.5000, 8708.99.4000, 8708.99.4960, 8708.99.50, 8708.99.8080, 8803.10.00, 8803.20.00, 8803.30.00, 8803.90.30, and 8803.90.90.

c. Spherical Plain Bearings, Mounted or Unmounted, and Parts Thereof: These products include all spherical plain bearings that employ a spherically shaped sliding element and include spherical plain rod ends. Imports of these products are classified under the following HTS subheadings: 3926.90.45, 4016.93.00, 4016.93.00, 4016.93.10,

4016.93.50, 6909.50,10, 8483.30.80, 8483.90.30, 8485.90.00, 8708.93.5000, 8708.99.50, 8803.10.00, 8803.10.00, 8803.20.00, 8803.30.00, and 8803.90.90. The HTS subheadings are provided for convenience and customs purposes. The written description of the scope of this proceeding is dispositive.

Size or precision grade of a bearing does not influence whether the bearing is covered by the AFB orders. These orders cover all the subject bearings and parts thereof (inner race, outer race, cage, rollers, balls, seals, shields, etc.) outlined above with certain limitations. With regard to finished parts, all such parts are included in the scope of these orders. For unfinished parts, such parts are included if (1) they have been heat-treated, or (2) heat treatment is not required to be performed on the part. Thus, the only unfinished parts that are not covered by these orders are those that will be subject to heat treatment after importation.

The ultimate application of a bearing also does not influence whether the bearing is covered by the orders. Bearings designed for highly specialized applications are not excluded. Any of the subject bearings, regardless of whether they may ultimately be utilized in aircraft, automobiles, or other equipment, are within the scopes of these orders.

B. Scope Determinations

The Department has issued numerous clarifications of the scope of the AFB orders. Interested parties can access all scope determinations for individual countries on the Web at www.ita.gov/sunset/ss.home.htm.

Supreme Court, U.S.
FILED
SEP 30 2004
OFFICE OF THE CLERK

(3)

No. 04-87

# In the Supreme Court of the United States

KOYO SEIKO CO., LTD. AND
KOYO CORPORATION OF U.S.A., PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
*Acting Solicitor General*
*Counsel of Record*

GREGORY G. KATSAS
*Acting Assistant Attorney General*

DAVID M. COHEN
JEANNE E. DAVIDSON
CLAUDIA BURKE
*Attorneys*

*Department of Justice*
*Washington, D.C. 20530-0001*
*(202) 514-2217*

## QUESTION PRESENTED

Whether the court of appeals correctly sustained the Department of Commerce's longstanding, and admittedly reasonable, construction of a domestic antidumping statute, notwithstanding a recent World Trade Organization panel's allegedly inconsistent construction of purportedly analogous provisions in an international trade agreement, where Congress has specifically provided that World Trade Organization recommendations have no domestic legal effect except as implemented by the Executive Branch or Congress.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Statement | 2 |
| Argument | 11 |
| Conclusion | 22 |


## TABLE OF AUTHORITIES

Cases:


| | |
|---|---|
| *Ali* v. *Ashcroft*, 346 F.3d 873 (9th Cir. 2003) | 20 |
| *Bowe Passat Reinigungs-Und Waschereitechnik GmbH* v. *United States*, 926 F. Supp. 1138 (Ct. Int'l Trade 1996) | 9, 17 |
| *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) | 11 |
| *F. Hoffman-La Roche Ltd.* v. *Empagran S.A.*, 124 S. Ct. 2359 (2004) | 13 |
| *George E. Warren Corp.* v. *U.S. Envtl. Prot. Agency*, 159 F.3d 616 (D.C. Cir. 1998), amended on other grounds, 164 F.3d 676 (D.C. Cir. 1999) | 21 |
| *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764 (1993) | 13 |
| *Lauritzen* v. *Larsen*, 345 U.S. 571 (1953) | 13 |
| *McCulloch* v. *Sociedad de Marineros de Honduras*, 372 U.S. 10 (1963) | 13, 18 |
| *McLaren* v. *Fleischer*, 256 U.S. 477 (1921) | 17 |
| *Murray* v. *The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804) | 11-12 |
| *Serampore Indus. Pvt. Ltd.* v. *United States Dep't of Commerce*, 675 F. Supp. 1354 (Ct. Int'l Trade 1987) | 9, 17 |
| *Weinberger* v. *Rossi*, 456 U.S. 25 (1982) | 13 |
| *Zenith Radio Corp.* v. *United States*, 437 U.S. 443 (1978) | 17 |

Statutes: Page

Anti-Dumping Act, 1921, ch. 14, § 201, 42 Stat. 11 (19 U.S.C. 160 *et seq.* (1976)) ..... 2
Tariff Act of 1930, ch. 497, Tit. VII, 46 Stat. 590 ..... 2
Trade Agreements Act of 1979, Pub. L. No. 96-39, Tit. I, § 101, 93 Stat. 162 (19 U.S.C. 1673 *et seq.*) ..... 2
19 U.S.C. 1673 ..... 2, 9
19 U.S.C. 1673d(c)(1)(B) ..... 3
19 U.S.C. 1675 ..... 4
19 U.S.C. 1675(a)(2)(A) ..... 4
19 U.S.C. 1675(a)(2)(C) ..... 4
19 U.S.C. 1677(35)(A) ..... 3, 16
19 U.S.C. 1677(35)(B) ..... 3, 4, 16
19 U.S.C. 1677a(a) ..... 2
19 U.S.C. 1677a(b) ..... 3
19 U.S.C. 1677a(c) ..... 3
19 U.S.C. 1677a(d)(1)(A) ..... 3
19 U.S.C. 1677b ..... 11
19 U.S.C. 1677b(a) ..... 2, 15
19 U.S.C. 1677b(a)(1)(B)(i) ..... 2
19 U.S.C. 1677b(a)(1)(C) ..... 4
19 U.S.C. 1677b(a)(4) ..... 4
19 U.S.C. 1677b(a)(6) ..... 3
19 U.S.C. 1677b(a)(7) ..... 3
19 U.S.C. 1677b(c)(3) ..... 4
19 U.S.C. 1677f-1(d)(1)(A) ..... 15
19 U.S.C. 1677f-1(d)(2) ..... 15
Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (19 U.S.C. 3501 *et seq.*) ..... 4
19 U.S.C. 3511 ..... 4
19 U.S.C. 3511(a) ..... 6, 8
19 U.S.C. 3511(d)(7) ..... 8
19 U.S.C. 3512 ..... 18
19 U.S.C. 3512(a)(1) ..... 5, 18
19 U.S.C. 3512(a)(2) ..... 5, 18-19
19 U.S.C. 3512(b)(2) (§ 102(b)(2)) ..... 19
19 U.S.C. 3512(c) ..... 10

Statutes—Continued: Page

19 U.S.C. 3512(c)(1) ..... 5, 19
19 U.S.C. 3512(c)(1)(B) ..... 9
19 U.S.C. 3512(d) ..... 6
19 U.S.C. 3512(d)(7) ..... 5
19 U.S.C. 3533 ..... 21
19 U.S.C. 3533(f)(3) ..... 6, 19
19 U.S.C. 3533(g)(1) ..... 6, 19
19 U.S.C. 3538(b)(4) ..... 6, 19

Miscellaneous:

*European Communities-Antidumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R (Mar. 1, 2001) ..... 8, 9, 10, 11, 14, 16
*Final Determination of Sales at Less Than Fair Value; Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from Japan*, 52 Fed. Reg. 37,352 (1987) ..... 7
*Tapered Roller Bearings and Certain Components from Japan*, 41 Fed. Reg. 34,974 (1976) ..... 7
*Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, from Japan; Preliminary Results of Antidumping Duty Administrative Reviews*, 65 Fed. Reg. (2000):
p. 66,711 ..... 7
p. 66,712 ..... 7
*Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from Japan, and Tapered Roller Bearings Four Inches or Less in Outside Diameter, and Components Thereof, from Japan; Final Results of Antidumping Duty Administrative Reviews*, 66 Fed. Reg. 15,078 (2001) ..... 8
H.R. Doc. No. 316, 103d Cong., 2d Sess. Pt. 1 (1994) ..... 6, 8, 19-20
Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (Apr. 15, 1994) ..... 8, 10, 14, 15, 16, 22

Miscellaneous—Continued: Page

*United States—Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/R (Apr. 13, 2004) ..... 15

*United States—Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R (Dec. 15, 2003) ..... 15, 16

# In the Supreme Court of the United States

No. 04-87

KOYO SEIKO CO., LTD. AND
KOYO CORPORATION OF U.S.A., PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 354 F.3d 1334. The opinion of the Court of International Trade (Pet. App. 19a-49a) is reported at 240 F. Supp. 2d 1228.

### JURISDICTION

The judgment of the court of appeals was entered on January 16, 2004. A petition for rehearing was denied on March 17, 2004. On June 10, 2004, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including July 15, 2004, and the

petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**STATEMENT**

1. The Anti-Dumping Act, 1921, and the Tariff Act of 1930 have long provided for the imposition of anti-dumping duties where "foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value." 19 U.S.C. 1673.[1] If the sale of a product at less than its fair value causes or threatens injury to an industry in the United States, the statute provides for imposition of an anti-dumping duty "in an amount equal to the amount by which the normal value [*i.e.*, the price when sold 'for consumption in the exporting country'] exceeds the export price [*i.e.*, the price when sold 'to an unaffiliated purchaser in the United States']." 19 U.S.C. 1673, 1677a(a), 1677b(a)(1)(B)(i).

In assessing whether merchandise is being "dumped" in the United States, the Department of Commerce adjusts both the "normal value" and the "export price" to achieve a "fair comparison" between the two. 19 U.S.C. 1677b(a). For example, the statute calls for subtracting transportation costs to the United States, if those are included in the export price, and eliminating the effect of import duties applied by the exporting

[1] This language was originally adopted in the Anti-Dumping Act, 1921, ch. 14, § 201, 42 Stat. 11, which, prior to 1979, was codified at 19 U.S.C. 160 *et seq.* (1976). It was subsequently re-enacted in 1979 as Title VII of the Tariff Act of 1930, ch. 497, 46 Stat. 590, as part of a more general revision of customs laws relating to the General Agreement on Tariffs and Trade. See Trade Agreements Act of 1979, Pub. L. No. 96-39, Tit. I, § 101, 93 Stat. 162 (re-codified at 19 U.S.C. 1673 *et seq.*).

country on imported parts. 19 U.S.C. 1677a(c), 1677b(a)(6) and (7).[2]

If the Department of Commerce makes a final determination that merchandise is being sold in the United States at less than its fair value, the Department is required to determine an "estimated weighted average dumping margin" for each exporter and producer and an "all-others" rate for those not individually investigated. 19 U.S.C. 1673d(c)(1)(B). Exporters and producers must then post a cash deposit or security for each entry in an amount based on the appropriate dumping margin. *Ibid.*

The statute specifies that the "dumping margin" is "the amount by which the normal value exceeds the export price," and that the "weighted average dumping margin" is "the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices" for that exporter or producer. 19 U.S.C. 1677(35)(A) and (B).

Under the Department of Commerce's long-standing construction of the statute, a "dumping margin" exits only when the normal value at which the product is sold in the exporting country "exceeds the export price" to

---

[2] Where, as in this case, there is a third-party intermediary, such as a broker or an affiliate of the seller, the statute calls for the Department of Commerce to use a "constructed export price," which entails further adjustment, including the elimination of commissions. 19 U.S.C. 1677a(b) and (d)(1)(A). Because the distinction between "export price" and "constructed export price" is irrelevant to the issues presented here, we will, for the sake of convenience, refer simply to "export price."

the United States by a positive value.[3] In other words, if the export price is the same as or higher than the normal value, the Department of Commerce deems there to be no, or zero, "dumping margin" for such sales, and thus nothing to include when summing the "aggregate dumping margin" that constitutes the numerator in the "weighted average dumping margin" ratio. Pet. App. 3a. These sales at or above the normal value are, however, reflected in the denominator of the ratio, which is the "aggregate export prices" of the exporter's sales. 19 U.S.C. 1677(35)(B).[4]

Once an affirmative dumping determination has been made, the statute provides for an administrative review of the antidumping duty to be conducted on an annual basis, upon request. 19 U.S.C. 1675. The dumping margin that is determined during the course of this review then becomes the basis for estimated anti-dumping duties that are collected on new entries of merchandise. 19 U.S.C. 1675(a)(2)(A) and (C).

2. In 1994, the United States became a signatory to the Uruguay Round Agreements. Congress enacted the Uruguay Round Agreements Act (URAA), 19 U.S.C. 3501 *et seq.*, to implement those executive agreements. 19 U.S.C. 3511. In the URAA, Congress established an elaborate process for resolving trade disputes that might arise concerning the agreements and domestic trade laws.

---

[3] Under certain circumstances not relevant here, normal value may be calculated using third-country sales, constructed value, or factors of production. 19 U.S.C. 1677b(a)(1)(C), (a)(4) and (c)(3).

[4] The inclusion of sales at and above the normal value in the denominator has the effect of lowering the weighted average dumping margin, and hence the anti-dumping duty, compared to what it would be if the denominator were derived using only export prices in sales in which dumping occurred.

As a general matter, Congress emphasized the continuing primacy of domestic law. As such, "[n]o provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect." 19 U.S.C. 3512(a)(1). Congress further stated, with respect to the interaction of the URAA and pre-existing law, that "[n]othing in this Act shall be construed * * * to limit any authority conferred under any law of the United States * * * unless specifically provided for in this Act." 19 U.S.C. 3512(a)(2).

The URAA also clarifies that the legislation implementing the Uruguay Round Agreements neither creates privately enforceable rights nor provides a basis for challenging an executive action:

> No person other than the United States—
>
> (A) shall have any cause of action or defense under any of the Uruguay Round Agreements or by virtue of congressional approval of such an agreement, or
>
> (B) may challenge, in any action brought under any provision of law, any action or inaction by any department, agency, or other instrumentality of the United States * * * on the ground that such action or inaction is inconsistent with such agreement.

19 U.S.C. 3512(c)(1).

Congress was also very specific about how the United States would respond to reports issued by World Trade Organization (WTO) panels or the Appellate Body under the WTO Dispute Settlement Understanding. The Statement of Administrative

Action (SAA) approved by Congress in connection with the passage of the URAA, see 19 U.S.C. 3511(a), 3512(d), states that WTO panels and the Appellate Body "will not have any power to change U.S. law or order such a change." H.R. Doc. No. 316, 103d Cong., 2d Sess. Pt. 1, at 656, 659 (1994). To the contrary, "[o]nly Congress and the Administration can decide whether to implement a WTO panel recommendation and, if so, how to implement it." *Ibid.*

The URAA provides that, if a WTO panel concludes "that a regulation or practice of a department or agency of the United States is inconsistent with any of the Uruguay Round Agreements, that regulation or practice may not be amended, rescinded, or otherwise modified in the implementation of such report unless and until" Congress, the United States Trade Representative (USTR), and the agency have consulted in the manner specified in the statute. 19 U.S.C. 3533(g)(1). During that process, the USTR, which represents the United States before the WTO, is to seek advice from the private sector, and the relevant agency must issue notice in the Federal Register and provide an opportunity for public comment. 19 U.S.C. 3533(g)(1).

The URAA specifically recognizes that the United States may choose *not* to alter the law or practice that is the subject of an adverse panel or Appellate Body report, and may instead offer the complaining party trade compensation of some other form. H.R. Doc. No. 316, *supra*, at 1016; 19 U.S.C. 3533(f)(3) (requiring USTR to consult with the appropriate congressional committees "concerning *whether to implement* the report's recommendation and, *if so*, the manner of such implementation and the period of time needed for such implementation" (emphasis added)); 19 U.S.C. 3538(b)(4) (USTR "may" direct implementation of new

determination consistent with WTO report "in whole or in part").

3. Petitioners are a Japanese company, Koyo Seiko Co., Ltd., and its wholly owned American subsidiary, Koyo Corporation of U.S.A., which manufacture tapered roller bearings, some of which are exported for sale in the United States. In 1976 and 1987, the Department of the Treasury and Department of Commerce determined that certain categories of tapered ball bearings from Japan were being sold in the United States at less than fair value. *Tapered Roller Bearings and Certain Components from Japan*, 41 Fed. Reg. 34,974 (1976); *Final Determination of Sales at Less Than Fair Value; Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from Japan*, 52 Fed. Reg. 37,352 (1987).

Petitioners export to the United States the types of ball bearings that were determined to have been dumped. *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, from Japan; Preliminary Results of Antidumping Duty Administrative Reviews*, 65 Fed. Reg. 66,711, 66,712 (2000). The antidumping duties on petitioners' exports were made the subject of an administrative review proceeding of the antidumping duty for the period from October 1, 1998, to September 30, 1999. *Id.* at 66, 712.

In that administrative review, which is the subject of the present litigation, petitioners challenged the Department of Commerce's method of calculating the weighted average dumping margin. Petitioners argued that Commerce's failure to include sales with a "negative" dumping margin, *i.e.*, where the export price exceeded the normal value, to offset instances of dumping

resulted in an inflated weighted average and was thus contrary to the Uruguay Round Anti-Dumping Agreement and the URAA.[5] In support, petitioners cited a WTO report involving the European Communities and India, which found that the European Communities' treatment of nondumped sales was inconsistent with the Anti-Dumping Agreement. Pet. App. 121a-122a (noting petitioners' reliance on *European Communities —Antidumping Duties on Imports of Cotton-Type Bed Linen from India* (*EC-Bed Linen*), WT/DS141/AB/R (Mar. 1, 2001), *reprinted in part at* Pet. App. 105a-118a .

In an Issues and Decision Memorandum, which the Department of Commerce adopted in its final determination, the Department responded that its treatment of petitioners' non-dumped sales followed from a long-standing interpretation of domestic law, which governed the proceeding, and noted that the methodology had been sustained repeatedly as reasonable by the Court of International Trade. Pet. App. 125a; *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from Japan, and Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Components Thereof, from Japan; Final Results of Antidumping Duty Administrative Reviews*, 66 Fed. Reg. 15,078 (2001) (adopting Issues and Decision Memorandum). The Department of Commerce also noted that the *EC-Bed Linen* report had addressed only the European Communities' antidumping duty, and "was not a challenge to U.S. law." Pet. App. 125a.

---

[5] The Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (Apr. 15, 1994) *reprinted in* H.R. Doc. No. 316, *supra*, at 807 (Anti-Dumping Agreement), was implemented as part of the Uruguay Round Agreements that created the WTO. See 19 U.S.C. 3511(a) and (d)(7).

4. Petitioners challenged the Department of Commerce's final determination in the Court of International Trade, which ruled in favor of the government.

The Court of International Trade first held that petitioners' reliance on the WTO's construction of the Uruguay Round Agreement was not foreclosed by 19 U.S.C. 3512(c)(1)(B), which provides that no person may "challenge, * * * under any provision of law, any action * * * by any department * * * on the ground that such action or inaction is inconsistent with such agreement." The court reasoned that this language barred only an "action under" a WTO agreement, not one based on Congress's presumed intent to act consistenty with the United States' international obligations. Pet. App. 33a.

Addressing the merits, the Court of International Trade noted that it had previously affirmed the Department of Commerce's treatment of non-dumped sales as a reasonable interpretation of 19 U.S.C. 1673. Pet. App. 41a (citing *Serampore Indus. Pvt. Ltd.* v. *United States Dep't of Commerce*, 675 F. Supp. 1354, 1360-1361 (Ct. Int'l Trade 1987), and *Bowe Passat Reinigungs-Und Waschereitechnik GmbH* v. *United States*, 926 F. Supp. 1138, 1150 (Ct. Int'l Trade 1996)). The court stated that it "would only continue to uphold the Department's practice of zeroing 'until it becomes clear that such a practice is impermissible.'" Pet. App. 41a (quoting *Bowe Passat*, 926 F. Supp. at 1150). The court found, however, that the *EC-Bed Linen* report had not clearly established that the Department of Commerce's methodology was "impermissible." *Id.* at 41a-43a. Specifically, the court noted that it could not determine whether the European Communities' method for calculating the duty at issue in *EC-Bed Linen* and the United States' practice at issue here were the same,

and that only the ministerial body of the WTO—not courts in the United States—could interpret an Appellate Body report. *Id.* at 41a-42a.

The court also noted possible bases for distinguishing the *EC-Bed Linen* report. Whereas the *EC-Bed Linen* report involved an initial antidumping investigation, covered by Article 2.4.2 of the Anti-Dumping Agreement, this case involves an annual review of sales already subject to an antidumping order, which are governed by distinct provisions in both the Anti-Dumping Agreement and the URAA. Pet. App. 42a-43a.

5. The Federal Circuit affirmed. Pet. App. 1a-18a. Like the Court of International Trade, the court of appeals first held that Section 3512(c) did not bar an "action under U.S. law" urging that a domestic statute should "be interpreted so as to avoid a conflict with international obligations." *Id.* at 7a-8a. On the merits, the court recognized that it was "a close question" whether the common definition of the word "exceeds" compelled the conclusion, adopted by the Department of Commerce, that only those sales in which the normal value was "greater than" the export price should be counted in computing the weighted average dumping margin. *Id.* at 9a. While the court declined to find that the statute unambiguously required the Department's construction, it held that the language "at a minimum allow[s]" for that interpretation. *Id.* at 10a. The court also found that the Department's view was supported by the statutory provision for calculating dumping duties "on an entry-by-entry basis," and by the previous endorsement of the Court of International Trade. *Id.* at 10a-11a.

The court of appeals specifically considered petitioners' argument that the Department's interpretation was no longer permissible in light of an amendment to 19 U.S.C. 1677b, adopted in 1994 as part of the URAA, which provided that, in determining whether dumping is occurring, a "fair comparison" should be made between the United States price and the normal value. The court noted that the statute "specifically defined" the requirements for making a "fair comparison," Pet. App. 13a, and that these requirements did not "unambiguously address the practice of zeroing," *id.* at 11a.

Finally, the court noted the inapplicability of the WTO panel report in *EC-Bed Linen*, which neither involved the United States' specific practice nor dealt with an "administrative review" of a prior "antidumping investigation." Pet. App. 14a. Thus, the court concluded, the *EC-Bed Linen* report was not "sufficiently persuasive to find the Department's practice unreasonable." *Ibid.*

**ARGUMENT**

The court of appeals correctly held that the Department of Commerce's calculation of aggregate dumping margins in this administrative review proceeding was reasonable. The decision of the court of appeals does not conflict with any decision of this Court or any other court of appeals. Further review is therefore unwarranted.

1. Petitioners contend (Pet. 2-4, 14-24) that the Court should grant certiorari to determine whether an agency's otherwise reasonable interpretation of a statute, which would normally be entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), must be overturned in light of *Murray* v. *The Schooner Charming*

*Betsy*, 6 U.S. (2 Cranch) 64 (1804), on the ground that the challenged agency practice is allegedly inconsistent with an international body's interpretation of an executive agreement to which the United States is a party. Petitioners rely (Pet. 2) on this Court's observation in *Charming Betsy* that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains," 6 U.S. (2 Cranch) at 118. According to petitioners, the *Charming Betsy* canon establishes broad judicial authority to conform domestic law and acts of the Executive Branch to principles of customary international law. For example, petitioners urge that "the *Charming Betsy* rule necessarily excludes from the range of otherwise reasonable [Executive Branch] interpretations those that violate an international obligation of the United States." Pet. 17.

We note at the outset that neither *Charming Betsy* nor other decisions of this Court applying it stand for such a broad principle. *Charming Betsy* itself dealt with the question whether a domestic statute prohibiting trade by Americans with France should be construed to apply to an American ship that had been purchased by a citizen of Denmark, a country that was neutral with respect to the hostilities between the United States and France. 6 U.S. (2 Cranch) at 115-116. Thus, as is clarified by the continuation of the sentence quoted by petitioners, the question specifically addressed by the Court was whether the statute adopted by Congress should "be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country." *Id.* at 118.

This Court's subsequent cases applying *Charming Betsy* have likewise involved avoidance of "unrea-

sonable interference with the sovereign authority of other nations." *F. Hoffman-La Roche Ltd.* v. *Empagran S.A.*, 124 S. Ct. 2359, 2366 (2004) (application of antitrust statute to conduct with adverse foreign effect). See *Weinberger* v. *Rossi*, 456 U.S. 25, 32 (1982) (application of employment discrimination statute to bases in foreign lands that were the subject of executive agreements with the host governments); *McCulloch* v. *Sociedad de Marineros de Honduras*, 372 U.S. 10, 20-22 (1963) (application of National Labor Relations Act to foreign-flag vessels); *Lauritzen* v. *Larsen*, 345 U.S. 571, 578 (1953) (application of Jones Act in maritime cases); see generally *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 814-815, 817 (1993) (Scalia, J., dissenting) (describing principle as one of "prescriptive comity," that "Congress is generally presumed not to have exceeded those customary international-law limits on jurisdiction to prescribe").

This case does not present a proper vehicle for considering whether the *Charming Betsy* canon should be extended in the manner advocated by petitioners. The court of appeals correctly concluded that the WTO reports upon which petitioners rely addressed a different type of administrative proceeding that is governed by a different provision of the Anti-Dumping Agreement. Thus, even if the *Charming Betsy* rule were as broad as petitioners contend and did apply to WTO reports, the WTO rulings on which petitioners rely would not be an adequate basis for overturning the Department of Commerce's long-standing and reasonable construction of the domestic antidumping statute. Moreover, the *Charming Betsy* canon, whatever its proper scope, has no application where, as here, Congress has unambiguously specified that alleged conflicts between a domestic agency action and the Uruguay

Round Agreements are to be resolved through consultation between the Executive and Legislative Branches, and not through litigation in domestic courts. Further review is therefore not warranted.

a. As the court of appeals correctly held, the Department of Commerce's determination at issue here is not inconsistent with the Uruguay Round Agreements or any WTO report concerning them. The court of appeals specifically noted petitioners' argument that, under *Charming Betsy*, the Department of Commerce's administrative review methodology should be overturned as inconsistent with the United States' obligations under the Anti-Dumping Agreement as construed by the WTO Appellate Body in *EC-Bed Linen*. Pet. App. 12a-13a. The court also noted the government's argument that, under the URAA, WTO reports could not be relied upon by the courts in the way petitioners urged. *Id.* at 7a. The court of appeals found it unnecessary to address the government's argument, however, because the WTO report upon which petitioners relied was not sufficiently on point to provide a basis for overruling the Department of Commerce's long-standing construction, even under petitioners' theory. *Id.* at 15a. Accordingly, this case does not actually present the question raised in the petition.

i. The court of appeals observed that the *EC-Bed Linen* case addressed only a specific determination of the European Commission. Pet. App. 14a. In particular, that case involved an initial dumping investigation, rather than an administrative review of a previous dumping determination, which are distinct proceedings and are governed by different provisions in the Anti-Dumping Agreement. *Ibid.* As the Court of International Trade explained, that difference is significant because, under the terms of both the Anti-Dumping

Agreement and United States law, the former involves "a comparison * * * of weighted averages for export prices and normal value," while the latter "involves a comparison * * * of weighted-average normal values to transaction-specific export prices." Pet. App. 42a. See *id.* at 127a-128a (Anti-Dumping Agreement, Art. 2.4.2, providing for average-to-average comparisons in "the investigation phase"); 19 U.S.C. 1677f-1(d)(1)(A) (same); 19 U.S.C. 1677f-1(d)(2) (providing, in administrative reviews, for comparison of "export prices * * * of individual transactions to the weighted average" of normal values).

Indeed, the WTO reports upon which petitioners rely have noted this same distinction, and the possibility that the practice of "zeroing" may be permissible in the context of an administrative review involving an export-transaction-to-average-normal-value comparison. See *United States—Final Dumping Determination on Softwood Lumber from Canada* (*US-Softwood Lumber*), WT/DS264/R (Apr. 13, 2004), *reprinted in part at* Pet. App. 63a, 79a n.361; *United States—Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan* (*US-Corrosion-Resistant Carbon*), WT/DS244/AB/R (Dec. 15, 2003), *reprinted in part at* Pet. App. 98a, 103a-104a (paras. 136-138).[6]

---

[6] Petitioners emphasize the WTO Appellate Body's reliance in the *EC-Bed Linen* report on the "fair comparison" language in Article 2.4 of the Anti-Dumping Agreement, and the fact that the URAA inserted the term "fair comparison" in 19 U.S.C. 1677b(a). Pet. 5-6, 9. As the court of appeals noted, however, the URAA exhaustively lists the requirements necessary to make the comparison "fair," a list that does not preclude "zeroing." Pet. App. 12a-13a. Moreover, in the *US-Softwood Lumber* report, the WTO panel did *not* rely upon the "fair comparison" language, but instead

Thus, the WTO has not yet addressed the practice of "zeroing" in administrative reviews. As the *US-Corrosion-Resistant Carbon* report reflects, the USTR is actively defending the administrative review methodology as consistent with the Anti-Dumping Agreement and takes the position that the *EC-Bed Linen* report "is not relevant" to that question. Pet. App. 103a (para. 136). The court of appeals agreed, and petitioners' fact-bound disagreement with that determination does not merit review.

ii. The court of appeals observed that while these WTO reports addressed, at best, only a somewhat analogous question, the Department of Commerce's position was supported by both the language of the statute and the agency's long-standing practice, which had been upheld repeatedly. Pet. App. 11a.

As noted, pp. 3-4, *supra*, the antidumping statute defines the term "weighted-average dumping margin" as "the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate * * * [United States] prices of such exporter or producer," 19 U.S.C. 1677(35)(B), and defines the term "dumping margin" as "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise," 19 U.S.C. 1677(35)(A). Thus, the statute directs the Department of Commerce to calculate the sum of the amounts "by which the normal value *exceeds* the export price." 19 U.S.C. 1677(35)(A) (emphasis

---

cited a different provision of Article 2.4.2, the requirement that an investigation comparison include "all comparable export transactions." See *US–Softwood Lumber, reprinted in part at* Pet. App. 77a-78a (para. 7.216), 81a (paras. 7.224-7.226). Notably, the URAA did not adopt the "all comparable export transactions" language into the governing statutory scheme.

added). The court of appeals recognized that it was a "close question" whether the Department of Commerce's approach, under which only positive dumping margins are counted, was compelled by the accepted definition of the word "exceed" as "greater than." Pet. App. 9a. At the very least, the court concluded, this reading is an eminently reasonable one. *Id.* at 10a.

Indeed, the zeroing practice, which has been followed for at least 20 years, has been repeatedly sustained as reasonable by the Court of International Trade, which has noted the practice's success in combating the problem of "masked dumping."[7] Pet. App. 11a (citing *Serampore*, 675 F. Supp. at 1360-1361, and *Bowe Passat*, 926 F. Supp. at 1150). As the Court of International Trade has noted, "[t]he practice of considering negative margins as zero ensures that sales made at less than fair value on a portion of a company's product line to the United States market are not negated by more profitable sales." *Serampore*, 675 F. Supp. at 1360. This "longstanding administrative construction of the statute should 'not be disturbed except for cogent reasons.'" *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 457-458 (1978) (quoting *McLaren* v. *Fleischer*, 256 U.S. 477, 481 (1921)).

The Federal Circuit's fact-specific holding that off-point WTO reports did not render impermissible the Department of Commerce's long-held, reasonable inter-

---

[7] Masked dumping occurs when "certain profitable sales serve to 'mask' sales at less than fair value." Pet. App. 11a. If non-dumped sales are included in the calculation of dumping margins, then foreign producers and importers will be better able to target particular markets within the United States in which to lower prices below normal value when necessary to capture sales.

pretation of the antidumping statute is correct and does not warrant review by this Court.

b. Even if the WTO reports were more directly on point, this case would be an inappropriate vehicle for considering the broad question of the relationship between *Chevron* and *Charming Betsy*. In the URAA, Congress has established an elaborate process by which the political branches, not the courts, are to determine whether and how the United States will alter its practices in light of reports from WTO bodies. Where Congress has spoken to the means of resolving purported conflict between domestic law and the United States' international commitments, the *Charming Betsy* presumption, whatever its proper scope, has no application.

As petitioners concede (Pet. i), *Charming Betsy* states a canon of statutory construction; it does not purport to establish an absolute rule that the "law of nations" trumps inconsistent domestic laws or governmental acts. See *McCulloch*, 372 U.S. at 21-22. In the face of a "clear expression" of congressional intent, the *Charming Betsy* canon is inapplicable. *Id.* at 22.

In enacting the URAA and adopting the SAA, Congress has unequivocally stated that United States domestic law shall take precedence over international law as established in the Uruguay Round executive agreements. The URAA specifically prohibits enforcement through judicial proceedings of purported international obligations under the Uruguay Round Agreements. In particular, in Section 3512, Congress specified the primacy of domestic law over any inconsistent provision of the Uruguay Round Agreements, 19 U.S.C. 3512(a)(1); clarified that, "unless specifically provided," nothing in the URAA "shall be construed * * * to limit any authority conferred under any law of the

United States," 19 U.S.C. 3512(a)(2); and specifically barred challenges, such as those raised in this case, to agency action on grounds of alleged incompatibility with the Uruguay Round Agreements, 19 U.S.C. 3512(c)(1) ("No person * * * may challenge, in any action brought under any provision of law, any action or inaction by any department * * * of the United States * * * on the ground that such action or inaction is inconsistent with such agreement.").

Congress also expressly provided that reports issued by WTO panels or the Appellate Body "will not have any power to change U.S. law or order such a change," H.R. Doc. No. 316, *supra*, at 659. If a WTO panel concludes "that a regulation or practice of a department or agency of the United States is inconsistent with any of the Uruguay Round Agreements, that regulation or practice may not be amended, rescinded, or otherwise modified in the implementation of such report unless and until" Congress, the USTR, and the agency have consulted about the appropriate response. 19 U.S.C. 3533(g)(1). Moreover, the statute contemplates that, as a result of that consultation, the United States may choose *not* to alter the law or practice that is the subject of an adverse Appellate Body report. H.R. Doc. No. 316, *supra*, at 1016; 19 U.S.C. 3533(f)(3), 3538(b)(4).[8]

---

[8] This is not to suggest that WTO panel and Appellate Body reports are entirely irrelevant under the URAA. In situations in which the United States has instituted an action against a state under Section 102(b)(2) of the URAA (19 U.S.C. 3512(b)(2)), a federal court may take judicial notice of a panel or Appellate Body report and consider the views of the panel or the Appellate Body to the extent that the court considers them to be persuasive. H.R. Doc. No. 316, *supra*, at 675. In addition, any agency of government may "consider[], or entertain[] argument on, whether its action or proposed action is consistent with the Uruguay Round agree-

Because Congress has clearly specified that the political branches, and not the courts, are to determine whether and how to conform the government's practices to the constructions of the executive agreement adopted by WTO bodies, there is no justification for resorting to *Charming Betsy* or any other default rule. Indeed, application of such a default rule in this case would thwart Congress's scheme rather than promote its presumed intentions.

2. Finally, contrary to petitioners' assertion, the decision of the Federal Circuit does not conflict with the decision of any other circuit regarding the question whether the *Charming Betsy* canon should be applied to invalidate an agency action that would otherwise be entitled to *Chevron* deference. Indeed, petitioners cite no case in which a court of appeals has struck down an otherwise reasonable agency interpretation of an ambiguous statute on *Charming Betsy* grounds.

Petitioners cite *Ali* v. *Ashcroft*, 346 F.3d 873 (9th Cir. 2003), as "employ[ing] the *Charming Betsy* rule to limit the range of interpretations that can be deemed reasonable, and therefore entitled to deference, under *Chevron*." Pet. 19. In fact, before it even reached the *Charming Betsy* question, the Ninth Circuit held that the agency was "not entitled to deference" because its "position is inconsistent with existing [agency] policy and regulations." 346 F.3d at 885. Plainly, then, *Ali* does not support petitioners' argument that an agency's long-standing and otherwise reasonable con-

---

ments, although any change in agency action would have to be authorized by domestic law." *Id.* at 676. But Congress made clear that "[a] private party * * * could not sue (or defend suit against) the United States, a state or a private party on grounds of consistency (or inconsistency) with [the WTO] agreements." *Ibid.*

struction of a statute can be invalidated on the basis of the *Charming Betsy* interpretive rule.

Petitioners also claim a conflict with the D.C. Circuit's decision in *George E. Warren Corp.* v. *U.S. Environmental Protection Agency*, 159 F.3d 616 (1998), amended on other grounds, 164 F.3d 676 (1999). But that case, which *upheld* an agency's discretion to take a WTO report into account in construing the relevant statute, presents no conflict with the Federal Circuit's ruling in this case. In *Warren*, the WTO issued an adverse opinion with respect to an Environmental Protection Agency (EPA) rule. 159 F.3d at 619. Pursuant to 19 U.S.C. 3533, the USTR "advised the WTO that the United States intended to comply" with the decision. 159 F.3d at 619. The EPA then promulgated a new rule, consistent with the USTR's decision. *Id.* at 619-620. The plaintiffs in *Warren* challenged the EPA's consideration of the WTO report in promulgating its new rule. The D.C. Circuit held that nothing in the text or structure of the statute indicated that "Congress intended to preclude the EPA from considering the effects a proposed rule might have upon the * * * treaty obligations of the United States." *Id.* at 623. The D.C. Circuit's opinion, which *permits* an agency to consider a WTO report where the Executive Branch determines that compliance is appropriate, provides no authority for a rule, such as that urged by petitioners, that an agency is *required* to amend its practices to conform to a WTO report with which the Executive Branch disagrees.

The decision below is entirely consistent with *Warren*. The court of appeals has not suggested that the Department of Commerce would be precluded from adopting a non-zeroing construction of the statute, if the WTO bodies ultimately determine that zeroing is

inconsistent with the Anti-Dumping Agreement as it relates to administrative reviews.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
*Acting Solicitor General*

GREGORY G. KATSAS
*Acting Assistant Attorney General*

DAVID M. COHEN
JEANNE E. DAVIDSON
CLAUDIA BURKE
*Attorneys*

SEPTEMBER 2004

(5)

Supreme Court, U.S.
FILED
OCT 12 2004
OFFICE OF THE CLERK

No. 04-87

IN THE

# Supreme Court of the United States

KOYO SEIKO CO., LTD.
AND KOYO CORPORATION OF U.S.A.,
*Petitioners,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit**

## REPLY BRIEF OF PETITIONERS

CARTER G. PHILLIPS*
JOSEPH R. GUERRA
NEIL R. ELLIS
MARINN F. CARLSON
NEIL C. PRATT
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

*Counsel for Petitioners*

* Counsel of Record

October 12, 2004

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS


| | Page |
|---|---|
| TABLE OF AUTHORITIES | ii |
| REPLY BRIEF OF PETITIONERS | 1 |
| CONCLUSION | 10 |

# TABLE OF AUTHORITIES

CASES Page

*Ali* v. *Ashcroft*, 346 F.3d 873 (9th Cir. 2003) ..... 6, 10
*George E. Warren Corp.* v. *U.S. EPA*, 159 F.3d 616 (D.C. Cir. 1998), *amended on other grounds by* 164 F.3d 676 (D.C. Cir. 1999) ..... 9
*Vimar Seguros y Reaseguros, S.A.* v. *M/V Sky Reefer*, 515 U.S. 528 (1995) ..... 8

STATUTES

19 U.S.C. § 1675(c) ..... 4
§ 1677b(a) ..... 2, 3
§ 1677f-1(d) ..... 2, 3
§ 3538(c)(1) ..... 6, 8

INTERNATIONAL AUTHORITIES

*Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade*, Apr. 15, 1944, Marrakesh Agreement Establishing the WTO, Annex 1A (1994) ..... 2, 4
*European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R (adopted Mar. 1, 2001) ..... 4
*United States – Section 129(c)(1) of the Uruguay Round Agreeements Act, Second Written Submission of the United States*, WT/DS221 (Mar. 8, 2002) ..... 6, 7
*United States – Sunset Review of Anti-Dumping Duties, on Corrosion-Resistant Steel Flat Products from Japan*, WT/DS244/AB/R (adopted Jan. 9, 2004) ..... 4, 5

TABLE OF AUTHORITIES—continued

OTHER AUTHORITY

Page

*Restatement (Third) of the Foreign Relations of the United States* (1987) ..... 6

## REPLY BRIEF OF PETITIONERS

In the decision below, the Federal Circuit incorrectly deferred to an agency interpretation of the Tariff Act of 1930 that squarely conflicts with the Nation's treaty obligations. As the *amicus* filing by the Government of Japan confirms, that conflict alone justifies this Court's review. In addition, the lower court's failure to recognize that the *Charming Betsy* canon afforded the agency discretion to avoid that conflict—and rendered the agency's treaty-violating interpretation of a concededly ambiguous statute unreasonable under *Chevron*—conflicts with the decisions of other circuits and increases the likelihood that other laws will be construed in a manner that violates the Nation's international legal obligations.

Unable to refute this showing, respondents seek instead to obscure and mislead. They argue that there is no conflict between the practice of "zeroing" and U.S. treaty obligations because the Department of Commerce (the "Department") applied zeroing in an administrative review, rather than in a dumping investigation. This is the classic distinction without a difference: The Tariff Act requires a "fair comparison" in both investigations and reviews; zeroing inflates and, in some cases, creates dumping liability in the same manner in both types of proceedings; and the relevant treaty provision applies to both types of proceedings, as the Appellate Body of the World Trade Organization ("WTO") has made clear.

The United States also argues that the *Charming Betsy* canon does not apply to the treaty obligations at issue in this case, and that the statute precludes reliance on this canon in judicial proceedings. The first of these claims is flatly contradicted by concessions the United States has made in WTO proceedings. The second claim is wrong as a matter of law, as both courts below expressly held.

Finally, the doctrinal conflict the decision below creates is real and important. In arguing otherwise, respondents simply mischaracterize the conflict identified in the petition between

the decision below and the decision of other courts of appeals regarding the application of the *Charming Betsy* canon.

1. Tacitly recognizing that an agency should not interpret an ambiguous statute in a manner that places the Nation in violation of its treaty obligations, the United States struggles in vain to show that the practice of zeroing does not conflict with the WTO Anti-Dumping Agreement ("AD Agreement").[1] The United States claims that differences between anti-dumping investigations and administrative reviews are so "significant" that, even though the Appellate Body has repeatedly condemned zeroing in investigations, this practice "may be permissible in the context of an administrative review." U.S. Opp. 14-15. This claim is baseless.

The only difference the United States identifies between the two types of proceedings, *id.* at 15, is that, in an investigation, the Department compares "the weighted average of the normal values to the weighted average of the export prices (and constructed export prices)," 19 U.S.C. § 1677f-1(d)(1)(A), whereas, in an administrative review, it compares the weighted average of the normal values to the "export prices (or constructed export prices) of individual transactions." *Id.* § 1677f-1(d)(2). As the title of this statutory subsection makes clear, however, both comparisons are made for the same purpose: to determine whether merchandise is being sold at "less than fair value." *Id.* § 1677f-1(d). Whenever the Department determines "whether subject merchandise is being, or is likely to be, sold at less than fair value," the Tariff Act requires the Department to do so based on a "fair comparison . . . between the export price or constructed export price and normal value," *id.* § 1677b(a)[2]—the very

---

[1] *Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade*, Apr. 15, 1944, Marrakesh Agreement Establishing the WTO, Annex 1A (1994)

[2] Section 1677b(a) requires a "fair comparison" for all determinations of "less than fair value" sales that are made "under this subtitle." 19

same comparison that Article 2.4 of the AD Agreement requires. See Pet. 5-6 (explaining how § 1677b(a) was modeled on, and implements, Article 2.4 AD Agreement). Thus, the methodologies prescribed for investigations and administrative reviews are simply two ways of determining the same concept—whether merchandise is sold at less than fair value—and Congress has mandated that, whenever the Department makes this determination—whether in investigations or administrative reviews—it must use the "fair comparison" that the AD Agreement requires.

Use of zeroing in administrative reviews, in turn, creates precisely the same statistical bias that the Appellate Body condemned when the practice is used in investigations. Whether the weighted average of normal values is compared to "the weighted average of the export prices," as in investigations, 19 U.S.C. § 1677f-1(d)(1)(A), or to the export prices "of individual transactions," as in administrative reviews, *id.* § 1677f-1(d)(2), both comparisons produce positive and "negative" dumping margins. The practice of zeroing is used to convert those negative margins to zero. Thus, in both investigations and administrative reviews, the practice inflates the weighted average dumping margin that would be found if the negative dumping margins were given their full mathematical effect, and can create dumping liability where none would otherwise exist. See Pet. 8 (illustrating zeroing's effect).[3]

---

U.S.C. § 1677b(a). Section 1677f-1(d), which governs the determination of such sales in both investigations and administrative reviews, is part of the same subtitle as § 1677b(a).

[3] The United States notes that the value of the sales that generate negative margins is included in the denominator used to calculate the weighted average dumping margin, which effectively lowers the margin compared to what it would be if the negative margin sales were excluded from both the numerator and denominator. U.S. Opp. 4 n.4. That zeroing could be performed in an even more statistically biased manner does not change the fact that this practice inflates dumping liability and can create

The AD Agreement and the Appellate Body's decisions make clear that this statistical bias is just as impermissible in administrative reviews as it is in investigations. The Appellate Body found that, when used in investigations, "'zeroing' . . . is *not* a 'fair comparison' between export price and normal value, as required by Article 2.4." Pet. App. 112a (*EC – Bed Linen*, ¶ 55). This same requirement applies to administrative reviews. These retrospective reviews are governed by Article 9.3.1 of the AD Agreement, and Article 9.3 states that the "amount of the anti-dumping duty shall not exceed the margin of dumping *as established under Article 2*." Reply App. 1a (emphasis added). Thus, the very same "fair comparison" requirement that prohibits the use of zeroing in investigations governs administrative reviews.

The Appellate Body has made clear, moreover, that zeroing's statistical bias precludes a "fair comparison" regardless of the type of anti-dumping proceeding in which it is used. In *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Steel Flat Products from Japan*,[4] the Appellate Body addressed the propriety of zeroing in "sunset" reviews, proceedings that occur every fifth year in which the Department relies on the dumping margin determinations from prior administrative reviews and initial investigations to determine whether anti-dumping orders should be continued or revoked. 19 U.S.C. § 1675(c). Because sunset reviews are also subject to Article 2.4's "fair comparison" requirement,[5] the Appellate Body cited its ruling in *EC – Bed Linen* when addressing the propriety of zeroing in such reviews. Noting that a comparison based on zeroing

---

such liability where none would otherwise exist in violation of the AD Agreement.

[4] WT/DS244/AB/R (adopted Jan. 9, 2004) ("*US – Corrosion-Resistant Steel*").

[5] Sunset reviews are governed by Article 11.3 of the AD Agreement, which, like Article 9.3, incorporates the requirements of Article 2. *See* Reply App. 13a-15a (*US – Corrosion-Resistant Steel* ¶¶ 126-127, 130).

"is not a 'fair comparison' . . . as required by Articles 2.4 and 2.4.2," the Appellate Body stated that when agencies "use a zeroing methodology such as that examined in *EC – Bed Linen* to calculate a dumping margin, whether in an original investigation *or otherwise*, that methodology will tend to inflate the margins calculated." Pet. App. 102a (¶¶ 134-135) (emphasis added). Because the United States claimed that it had not used zeroing, factual inadequacies in the record prevented the Appellate Body from determining "whether the methodology that [the Department] used in calculating the dumping margins in the administrative reviews was equivalent in effect to the methodology used . . . in *EC – Bed Linen*." *Id.* at 104a (¶ 137). The Appellate Body left no doubt, however, that where, as here, zeroing or a practice of "equivalent effect" *is* used in administrative reviews, it violates Article 2.4's "fair comparison" requirement.

2. As petitioners have shown, the clear conflict between zeroing and the requirements of the AD Agreement should have been avoided through application of the *Charming Betsy* canon. The Federal Circuit's failure to apply that canon—and instead to uphold a statutory interpretation that exposes the Nation to substantial trade sanctions (Japan Br. 9, 12-13)—was a clear and significant error of law.

The United States contends that the *Charming Betsy* canon can play no role in the interpretation of ambiguous statutory language implicating U.S. compliance with the AD Agreement.[6] That canon, it contends, is designed only to avoid "unreasonable interference with the sovereign authority of other nations," U.S. Opp. 12-13 (internal quotation marks

---

[6] The United States half-heartedly suggests that the lower court did not pass on the *Charming Betsy* question because of distinctions between *EC – Bed Linen* and this case. U.S. Opp. 14. But, before it mentioned those distinctions, the court rejected petitioners' *Charming Betsy* claim. *See* Pet. App. 15a (because the Department's construction "is entitled to considerable weight, we refuse to overturn the zeroing practice based on *EC – Bed Linen*") (internal quotation marks and citation omitted).

omitted), and "has no application where, as here, Congress has unambiguously specified that alleged conflicts between a domestic agency action and the Uruguay Round Agreements are to be resolved through consultation between the Executive and Legislative Branches, and not through litigation in domestic courts." *Id.* at 13-14. The United States cites no case, however, in which this Court has restricted the *Charming Betsy* canon to cases involving the sovereign authority of other nations, and it is well settled that the canon applies to all international obligations, not just those owed to other sovereigns. See *Restatement (Third) of the Foreign Relations of the United States* § 114 (1987) (ambiguous statutes should "be construed, where possible, to be consistent with international obligations of the United States"); *Ali* v. *Ashcroft*, 346 F.3d 873, 885 (9th Cir. 2003) (applying canon to U.S. obligation to aliens).

Moreover, the United States has recently acknowledged that the canon applies to the very statute at issue here. In dispute settlement proceedings before the WTO, Canada argued that § 129(c)(1) of the Uruguay Round Agreements Act ("URAA") (codified at 19 U.S.C. § 3538(c)(1)) mandated a violation of the AD Agreement because it barred the Department from retrospectively applying definitive interpretations of the AD Agreement to previously imported goods. The United States dismissed this argument, explaining that, "U.S. courts and agencies must recognize the longstanding and elementary principle of U.S. statutory construction that 'an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.'"[7] In stark contrast to its current claims, the United States nowhere suggested that the "continuation of th[is] sentence" from *Charming Betsy*, U.S.

---

[7] *United States – Section 129(c)(1) of the Uruguay Round Agreements Act, Second Written Submission of the United States*, WT/DS221 ¶ 12 (Mar. 8, 2002) (quoting *Murray v. Schooner Charming Betsy*, 6 U.S. (4 Cranch) 64, 118 (1804)) (attached hereto as Reply App. 4a).

Opp. 12, rendered this "elementary principle" inapplicable to statutes implementing international trade agreements.

Similarly, while the United States now claims that § 3512(c)(1) bars all judicial challenges, "such as those raised in this case, to agency action on grounds of alleged incompatibility with the Uruguay Round Agreements," *id.* at 19, it told the WTO that § 3538(c)(1) "does not limit judicial review of the results of [Department anti-dumping proceedings], and it does not limit [the Department's] obligation to implement the results of any such judicial proceedings." Reply App. 9a (¶ 20). On the basis of this interpretation of U.S. law, the WTO rejected Canada's claim. It would have been extraordinarily disingenuous for the United States to assure the WTO that § 129(c)(1) permitted judicial review of Department anti-dumping proceedings if, as the United States now claims, other provisions of the URAA precluded that very review.

In all events, the United States' § 3512(c)(1) argument is plainly wrong, as both courts below held. Pet. App. 8a, 40a.[8] Section 3512 is designed to establish "the primacy of domestic law over any inconsistent provision of the Uruguay Round Agreements." U.S. Opp. 18. Thus, where U.S. law mandates or authorizes executive branch action, § 3512 is properly read to bar litigants from challenging that action on the ground that U.S. treaty obligations trump such a mandate or authorization. The issue in this case, however, is different. Because the statute is ambiguous, the very question is *whether* U.S. law authorizes zeroing. In answering that question, courts properly employ ordinary principles of statutory construction, including the *Charming Betsy* canon. Indeed, it is undisputed that Congress expressly incorporated Article 2.4's "fair comparison" requirement into the Tariff

---

[8] Contrary to the United States' claims, U.S. Opp. 14, the Federal Circuit addressed its § 3512(c)(1) argument, ruling "that § 3512(c) does not prevent us from addressing Koyo's" claims. Pet. App. 8a.

Act. Pet. 6-7. It is absurd to suggest that, having tied the meaning of U.S. law to a treaty requirement, Congress barred courts from considering whether the administering agency's interpretation of that statute was consistent with the WTO's authoritative interpretations of the underlying treaty provision.

Respondents' reliance on URAA provisions that prescribe how the political branches will resolve treaty violations, U.S. Opp. 13-14, 19-20; Timken Opp. 5-6, 11-13, is misplaced for the same reason. These provisions apply when U.S. law mandates or authorizes action that the WTO deems violative of the treaty, not when courts determine *whether* an ambiguous statute authorizes practices inconsistent with treaty terms. The "consultation" and "implementation" provisions respondents cite thus do not disable courts from applying the *Charming Betsy* canon to resolve such questions.[9] Indeed, such a reading of these provisions of the statute would lead to unnecessary friction between the United States and other nations, and would compel the political branches to resolve conflicts with WTO rulings that Congress never intended to authorize in the first place.

In short, by failing to apply the *Charming Betsy* canon, the lower court has blessed an administrative interpretation that creates an unnecessary conflict with the AD Agreement. That failure, which undermines the Nation's "role as a trusted partner in multilateral endeavors," *Vimar Seguros y Reaseguros, S.A.* v. *M/V Sky Reefer*, 515 U.S. 528, 539

---

[9] Nor do they immunize an erroneous decision from review where, as here, goods are imported before the Appellate Body condemns a practice. Timken Opp. 8-9. This claim is based on § 129(c)(1), 19 U.S.C. § 3538(c)(1), which comes into play when (a) U.S. law authorizes action, (b) the WTO deems that action violative of the AD Agreement, and (c) the United States decides to comply with the WTO's ruling. That a compliance decision (step c) has only prospective effect is irrelevant to whether the Federal Circuit erroneously upheld the Department's misinterpretation of U.S. law (step a).

(1995), and exposes the Nation to retaliatory sanctions by its trading partners, plainly warrants this Court's review.

3. The need for such review is underscored by the doctrinal conflict in the lower courts over the proper role of the *Charming Betsy* canon when courts review the increasing number of administrative interpretations of federal laws that implicate the Nation's international legal obligations. Respondents' facile distinctions of the cases petitioners have cited do not undermine this additional basis for review.

The United States argues that in the decision below and in *George E. Warren Corp.* v. *U.S. EPA*, 159 F.3d 616 (D.C. Cir. 1998), *amended on other grounds by* 164 F.3d 676 (D.C. Cir. 1999), both courts upheld the agency interpretations at issue. U.S. Opp. 21. This happenstance, however, cannot obscure the fundamental conflict in the courts' respective approaches to the *Charming Betsy* canon. The Federal Circuit has concluded that a statute's exhaustive specification of factors an agency is to consider effectively overrides the canon and deprives an agency of discretion to interpret U.S. law in a manner that does not violate U.S. treaty obligations. Pet. App. 13a-14a. The D.C. Circuit applied the canon in precisely the opposite manner. Citing *Charming Betsy* and the obligation to avoid a "conflict with a treaty obligation," the D.C. Circuit held that an agency enjoyed discretion to construe domestic law to avoid a conflict with an Appellate Body ruling, even though the statute's exhaustive specification of the factors the agency was to consider did not include consideration of U.S. treaty obligations. *George E. Warren Corp.*, 159 F.3d at 623-24.[10] The Federal Circuit's contrary approach increases the likelihood of conflicts between U.S. law and U.S. treaty obligations, which is what the *Charming Betsy* canon is intended to avoid.

---

[10] Timken's claim that the *Charming Betsy* canon "played no role in [*Warren*'s] Chevron analysis," Timken Opp. 17-18, is thus flatly wrong.

Similarly, the United States dismisses the conflict between the decision below and *Ali* v. *Ashcroft*, 346 F.3d 873 (9th Cir. 2003), because, in the latter case, the Ninth Circuit found that the agency's interpretation of an ambiguous statute was inconsistent with its own regulations. U.S. Opp. 20-21. Although this inconsistency deprived the agency's interpretation of full *Chevron* deference, *Ali*, 346 F.3d at 885, the Ninth Circuit did not rule that the inconsistency rendered the agency's interpretation impermissible. In addressing this ultimate question, the Ninth Circuit reasoned that, because the agency's interpretation would lead to a violation of U.S. international obligations, it was inconsistent with Congress's presumed intent that U.S. law conform to such obligations. *Id.* at 885-86. In stark contrast, the Federal Circuit never considered how this presumption (embodied in the *Charming Betsy* canon) affects the reasonableness of an administrative interpretation. Instead, it ruled that the Appellate Body's decision in *EC – Bed Linen* was not sufficiently "persuasive" to render a "longstanding" agency interpretation unreasonable. Pet. App. 14a.[11]

The conflict between the Federal Circuit's approach and that of a sister circuit is fundamental. And, moreover, the Federal Circuit's approach increases the likelihood that U.S. law will be construed in a manner that gives rise to unintended violations of U.S. international legal obligations. This conflict further underscores the need for review of the decision below.

## CONCLUSION

This Court should grant the petition for a writ of certiorari.

---

[11] In fact, the lower court's reliance on the "longstanding" use of zeroing is misplaced. Congress incorporated the "fair comparison" requirement into Tariff Act in 1994, after the Department adopted zeroing. Continued adherence to a practice after Congress changes the law and ties its meaning to that of a treaty is not a basis for *Chevron* deference.

Respectfully submitted,

CARTER G. PHILLIPS*
JOSEPH R. GUERRA
NEIL R. ELLIS
MARINN F. CARLSON
NEIL C. PRATT
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

*Counsel for Petitioners*

* Counsel of Record

October 12, 2004

## APPENDIX A

## WORLD TRADE ORGANIZATION

## AGREEMENT ON IMPLEMENTATION OF ARTICLE VI OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994

("Anti-dumping Agreement")

* * * *

*Members* hereby *agree* as follows:

### *PART I*

* * * *

### *Article 9: Imposition and Collection Of Anti-Dumping Duties*

* * * *

9.3 The amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2.

9.3.1 When the amount of the anti-dumping duty is assessed on a retrospective basis, the determination of the final liability for payment of anti-dumping duties shall take place as soon as possible, normally within 12 months, and in no case more than 18 months, after the date on which a request for a final assessment of the amount of the anti-dumping duty has been made.[20] Any refund shall be made promptly and normally in not more than 90 days follow-

---

[20] It is understood that the observance of the time-limits mentioned in this subparagraph and in subparagraph 3.2 may not be possible where the product in question is subject to judicial review proceedings.

ing the determination of final liability made pursuant to this sub-paragraph. In any case, where a refund is not made within 90 days, the authorities shall provide an explanation if so requested.

* * * *

# APPENDIX B

## *UNITED STATES – SECTION 129(c)(1) OF THE URUGUAY ROUND AGREEMENTS ACT*

## (WT/DS221)

## SECOND WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA

**March 8, 2002**

* * * *

### I. Canada Has Failed to Establish that Section 129(c)(1) of the URAA Mandates a Breach of U.S. Obligations Under the AD Agreement, the SCM Agreement, or GATT 1994

* * * *

#### B. The Meaning of Section 129(c)(1) Is a Factual Question That Must Be Answered by Applying U.S. Principles of Statutory Interpretation

10. The United States has argued at length in its first written submission, in its oral statement at the first Panel meeting, and in its answers to the Panel's questions, that section 129(c)(1) does not breach WTO rules because "prospective" implementation in WTO disputes involving antidumping and countervailing duty measures requires a Member to ensure that the new determination applies to all merchandise that enters for consumption on or after the date of implementation. However, even if Canada were correct in arguing that date of entry is not the controlling issue, section 129(c)(1) can violate WTO rules only if it *mandates* the actions that Canada alleges. If it does not do so, then Canada's claims must fail, regardless of what it means to implement a new determination in a WTO-consistent manner.

11. It is well-established that municipal law consists not only of the provisions being examined, but also domestic

legal principles that govern the interpretation of those provisions.[8] While the Panel is not bound to accept the interpretation presented by the United States, the United States believes that the Panel should give considerable deference to the United States' views on the meaning of its own law.[9]

12. For purposes of ascertaining the meaning of section 129(c)(1) as a matter of U.S. law, U.S. courts and agencies must recognize the longstanding and elementary principle of U.S. statutory construction that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). While international obligations cannot override inconsistent requirements of domestic law, "ambiguous statutory provisions . . . [should] be construed, where possible, to be consistent with international obligations of the United States."[10]

### C. Canada's Arguments Fail to Establish that Section 129(c)(1) Mandates Action Inconsistent with WTO Rules

13. Canada makes a number of arguments regarding why section 129(c)(1) allegedly breaches various provisions of the AD Agreement, the SCM Agreement, and GATT 1994. Each of the arguments is a variant on a common theme, and each arises from a common assumption. To quote Canada's response to a question from the Panel:

---

[8] *See, e.g.*, Panel Report on *United States – Section 301-310 of the Trade Act of 1974*, WT/DS152/R, adopted 27 January 2000, para. 7.108 & n. 681 ("*U.S. 301*").

[9] *U.S. 301*, para. 7.19.

[10] *Restatement (Third) of the Foreign Relations Law of the United States*, § 114 (1987) (Exhibit U.S.–11); and *U.S. 301*, note 681, in which the panel recognized the existence of what is known in the United States as "the *Charming Betsy* doctrine".

> The language of section 129(c)(1), by limiting compliance to future entries, has the effect of precluding the Department of Commerce from taking action to comply with the DSB ruling with respect to prior unliquidated entries. As Canada understands U.S. law, section 129(c)(1) would be interpreted this way because otherwise the express limitation to future entries contained in that section would be meaningless. The language of section 129(c)(1) precludes the Department of Commerce from applying the determination to prior unliquidated entries.
>
> Since Section 129(c)(1) directs the Department to apply a new WTO-consistent determination to all unliquidated entries entered on or after a particular date, section 129(c)(1) precludes the Department of Commerce from applying the new determination to unliquidated duties made prior to the particular date. That is, the use of the word "after" in section 129(c)(1) excludes any interpretation that would allow the Department of Commerce to apply the new determination to prior entries. Thus, by virtue of U.S. statutory interpretation and administrative law principles, the Department is precluded from applying the new determination to prior unliquidated entries.[11]

14. Canada's assumption, however, is not correct. Canada's error arises from a mistaken interpretation of the term "determination" as that term is used in section 129(c)(1). As the United States explains below, when the term is properly understood, it becomes clear that Canada's claims and arguments do not establish that section 129(c)(1) mandates WTO-inconsistent action.

15. Section 129(c)(1) states in its entirety:

> (c) *Effects of Determinations; Notice of Implemen-*

---

[11] Canada's Responses to Questions, paras. 48, 49.

*tation.*—

(1) *Effects of determinations.*—Determinations concerning title VII of the Tariff Act of 1930 that are implemented under this section shall apply with respect to unliquidated entries of the subject merchandise (as defined in section 771 of that Act) that are entered, or withdrawn from warehouse, for consumption on or after—

(A) in the case of a determination by the Commission under subsection (a)(4), the date on which the Trade Representative directs the administering authority under subsection (a)(6) to revoke an order pursuant to that determination, and

(B) in the case of a determination by the administering authority under subsection (b)(2), the date on which the Trade Representative directs the administering authority under subsection (b)(4) to implement that determination.

16. As the text demonstrates, the scope of section 129(c)(1) is actually quite limited. It only addresses the treatment of entries that take place on or after the date of implementation, and even then, it only addresses the application of the *particular determination issued under the authority of section 129(c)(1)* to those entries. It does not address what actions Commerce may or may not take in a *separate* determination in a *separate* segment of the proceeding (*i.e.*, any separate review of the order), and thus does not mandate that Commerce take (or preclude Commerce from taking) any particular action in any separate segment of the proceeding.[12]

---

[12] Section 351.102 of Commerce's regulations defines a segment of a proceeding as follows:

(1) *In general.* An antidumping or countervailing duty proceeding consists of one or more *segments*. "Segment of a proceeding" or

17. As the United States discussed in response to question 46 from the Panel, this point can be illustrated by considering the case of a challenge to a Commerce Department final dumping determination in an investigation. If the challenge were successful, Commerce would make the necessary changes in its methodologies and issue a new, WTO-consistent determination.[13] It would then apply that new determination by setting a new cash deposit rate, which would apply to all entries that took place on or after the implementation date. It is this new determination that is the "determination" referenced in section 129(c)(1).

18. If a company were then to request an administrative review of what Canada terms "prior unliquidated entries," Commerce would conduct the administrative review and issue

---

"segment of the proceeding" refers to a portion of the proceeding that is reviewable under section 516A of the Act.

(2) *Examples.* An antidumping or countervailing duty investigation or a review of an order or suspended investigation, or a scope inquiry under § 351.225, each would constitute a segment of a proceeding.

[13] Section 129(c)(1) does not preclude USTR from directing implementation prior to the end of the reasonable period of time, and it does not preclude Commerce from implementing within the reasonable period of time. In both applications of section 129(c)(1) to date, USTR has directed implementation, and Commerce has implemented, before the end of the reasonable period of time. *See United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea, Status Report by the United States*, WT/DS99/6, 17 January 2000, paras. 4, 8, 10 (explaining that USTR issued its request in the *DRAMS* case on August 2, 1999, that Commerce issued its new determination on November 4, 1999, and that the reasonable period of time expired on November 19, 1999) (Exhibit US-12); *see also* Exhibit US-9 (explaining that USTR issued its request in the *Stainless Steel* case on April 18, 2001 and that Commerce issued its new determination on August 28, 2001); *United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea, Agreement Under Article 21.3(b) of the DSU*, WT/DS179/5, 1 May 2001 (explaining that the reasonable period of time in the *Stainless Steel* case expired on September 1, 2001) (Exhibit US-13).

a new determination. Since the administrative review determination would not be the "determination implemented under section 129(c)(1)," nothing in section 129(c)(1) would preclude Commerce from applying its new, WTO-consistent methodologies in the administrative review.[14] Canada is simply wrong to claim that section 129(c)(1) would preclude Commerce from doing so.

19. The second scenario that Canada has raised is a situation where the WTO challenge results in the revocation of an antidumping or countervailing duty order because the new, WTO-consistent determination results in a finding of no injury, no dumping, or no subsidization. Under the terms of section 129(c)(1), the revocation would apply to all entries which took place on or after the date of revocation of the order, so Commerce would instruct the U.S. Customs Service to stop requiring cash deposits as of that date. In any subsequent administrative review, Commerce would need to decide what to do with respect to entries that took place prior to the date of revocation.

20. Canada has not challenged an actual application of section 129(c)(1) in such a scenario, and Commerce has not addressed such a scenario to date. The only impact of section 129(c)(1), however, is that Commerce would not determine the fate of those pre-implementation entries *in the revocation*

---

[14] As Canada argued in the first Panel meeting:

> [t]he law applied [in an administrative review] is the law as interpreted by the Department of Commerce *at the time that it makes its administrative review decision. The Department of Commerce's interpretation may be quite different from the interpretation it originally applied in the original investigation or in previous administrative reviews.* Examples are instances in which a U.S. court has held that the Department of Commerce's interpretation of the law is incorrect or where the Department of Commerce has decided that a different interpretation of the law is more appropriate.

*See* Canada's Oral Statement at the first Panel meeting, para. 11 (emphasis added).

*determination itself.* Section 129(c)(1) does not require Commerce to apply duties to those entries,[15] it does not limit Commerce's discretion in deciding how to administer the law in separate segments of the proceeding with respect to those entries, it does not limit judicial review of the results of those separate proceedings, and it does not limit Commerce's obligation to implement the results of any such judicial proceedings.[16] Accordingly, section 129(c)(1) does not mandate a breach of any of the provisions of the AD Agreement, the SCM Agreement, or GATT 1994 that Canada cites.

21. Since section 129(c)(1) does not mandate any particular treatment of what Canada terms "prior unliquidated entries" in any determination other than the particular one that is issued under its terms, section 129(c)(1) could *mandate* a breach of WTO rules only if the AD Agreement, the SCM Agreement, or GATT 1994 contained an affirmative obligation for Members to ensure that any implementation of adverse DSB recommendations and rulings applied to both pre- and post-implementation entries. None of the Agreements contains such an obligation; none of the Agreements even addresses what constitutes proper implementation in WTO disputes. The only agreement that *does* address a Member's implementation obligations is the DSU, and Canada has declined to pursue any DSU claims. Under the

---

[15] Even the SAA states only that the entries "would remain subject to potential duty liability." SAA at 1026.

[16] In response to the Panel's questions, Canada admitted that section 129(c)(1) would *not* violate WTO rules if Commerce "change[d] its interpretation of U.S. law for other reasons, notably as a result of a direction from a U.S. court." *See* Canada's Responses to Questions, para. 54. It also admitted that section 129(c)(1) "would not prevent a U.S. court from directing the Department of Commerce to change the basis on which it made definitive determinations . . . ." *See id.*, para. 51.

DSU, a Member's implementation obligations are prospective only.[17]

* * * *

[17] The United States discusses below why, contrary to Canada's repeated assertions, it is in fact seeking through this dispute to establish a right of retroactive relief in cases involving antidumping and countervailing measures.

**APPENDIX C**

**WORLD TRADE ORGANIZATION**

**WT/DS244/AB/R**
15 December 2003
(03-6603)

Original: English

**UNITED STATES—SUNSET REVIEW OF ANTI-DUMPING DUTIES ON CORROSION-RESISTANT CARBON STEEL FLAT PRODUCTS FROM JAPAN**

**AB-2003-5**

***Report of the Appellate Body***

* * * *

## VI. Japan's Specific Claims under Article 11.3 of the *Anti-Dumping Agreement*

* * * *

### C. *The Dumping Margins Used in the CRS Sunset Review*

* * * *

#### 2. *Review of the Panel Findings*

123. In making its findings on this issue, the Panel correctly noted that Article 11.3 does not expressly prescribe any specific methodology for investigating authorities to use in making a likelihood determination in a sunset review.[141] Nor does Article 11.3 identify any particular factors that authorities must take into account in making such a determination. Thus, Article 11.3 neither explicitly requires

---

[141] Panel Report, para. 7.166.

authorities in a sunset review to calculate fresh dumping margins, nor explicitly prohibits them from relying on dumping margins calculated in the past.[142] This silence in the text of Article 11.3 suggests that no obligation is imposed on investigating authorities to calculate or rely on dumping margins in a sunset review.

124. We consider that it is consistent with the different nature and purpose of original investigations, on the one hand, and sunset reviews, on the other hand, to interpret the *Anti-Dumping Agreement* as requiring investigating authorities to calculate dumping margins in an original investigation, but not in a sunset review. In an original investigation, if investigating authorities of a Member do not determine a positive dumping margin, the Member may not impose anti-dumping measures based on that investigation. In a sunset review, dumping margins may well be relevant to, but they will not necessarily be conclusive of, whether the expiry of the duty would be likely to lead to continuation or recurrence of dumping.

125. The Panel observed that the technique of cross-referencing is frequently used in the *Anti-Dumping Agreement*. For example, Article 11.4 indicates that the "provisions of Article 6 regarding evidence and procedure shall apply" to reviews under Article 11. Similarly, Article 11.5 applies the provisions of Article 11 to price undertakings accepted under Article 8. The Panel observed that, by contrast, Article 11 contains no cross-reference to Article 2[143], which prescribes how to calculate a dumping margin. In this context, we agree with the Panel that the absence of a cross-reference in Article 11 to Article 2 may be of some significance.

---

[142] Neither Japan nor the United States suggests that investigating authorities are required in a sunset review under Article 11.3 to calculate likely *future* dumping margins. (*Ibid.*, para. 7.162)

[143] Panel Report, para. 7.166.

126. However, as we have already observed, the opening words of Article 2.1 ("[f]or the purpose of this Agreement") go beyond a cross-reference and indicate that Article 2.1 applies to the entire *Anti-Dumping Agreement*.[144] By virtue of these words, the word "dumping" as used in Article 11.3 has the meaning described in Article 2.1. We do not read the Panel Report as suggesting otherwise.[145]

127. Article 2 sets out the agreed disciplines in the *Anti-Dumping Agreement* for calculating dumping margins. As observed earlier[146], we see no obligation under Article 11.3 for investigating authorities to calculate or rely on dumping margins in determining the likelihood of continuation or recurrence of dumping. However, should investigating authorities choose to rely upon dumping margins in making their likelihood determination, the calculation of these margins must conform to the disciplines of Article 2.4. We see no other provisions in the *Anti-Dumping Agreement* according to which Members may calculate dumping margins. In the CRS sunset review, USDOC chose to base its affirmative likelihood determination on positive dumping margins that had been previously calculated in two particular administrative reviews. If these margins were legally flawed because they were calculated in a manner inconsistent with Article 2.4, this could give rise to an inconsistency not only with Article 2.4, but also with Article 11.3 of the *Anti-Dumping Agreement*.

128. It follows that we disagree with the Panel's view that the disciplines in Article 2 regarding the calculation of dumping margins do not apply to the likelihood determination to be made in a sunset review under Article 11.3.[147]

---

[144] *Supra*, paras. 108-109.

[145] Panel Report, para. 7.174 and footnote 144 thereto.

[146] *Supra*, paras. 123-124.

[147] Panel Report, para. 7.168.

Accordingly, we reverse the Panel's consequential finding, in paragraph 8.1(d)(iii) of the Panel Report, that the United States did not act inconsistently with Article 2.4 of the *Anti-Dumping Agreement* in the CRS sunset review by relying on dumping margins alleged by Japan to have been calculated in a manner inconsistent with Article 2.4.[148]

129. We now turn to the Panel's alternative finding that the United States did not act inconsistently with *Article 11.3* in the CRS sunset review by relying on these dumping margins.[149] The Panel based this finding primarily on two factors: first, that NSC did not object in the CRS sunset review to USDOC relying on the dumping margins from the administrative reviews; and second, that NSC relied on these margins in the CRS sunset review in support of its argument that USDOC should make a negative likelihood determination.[150]

130. As explained above[151], if a likelihood determination is based on a dumping margin calculated using a methodology inconsistent with Article 2.4, then this defect taints the likelihood determination too. Thus, the consistency with Article 2.4 of the methodology that USDOC used to calculate the dumping margins in the administrative reviews bears on the consistency with Article 11.3 of USDOC's likelihood determination in the CRS sunset review. In the CRS sunset review, USDOC based its determination that "dumping is likely to continue if the [CRS] order were revoked" on the "existence of dumping margins" calculated in the administrative reviews.[152] If these margins were indeed

---

[148] See also *ibid.*, para. 7.170.

[149] Panel Report, para. 7.184.

[150] *Ibid.*, para. 7.183.

[151] *Supra*, paras. 126-127.

[152] "Issues and Decision Memo for the Full Sunset Review of Corrosion-Resistant Carbon Steel Flat Products from Japan; Final

calculated using a methodology that is inconsistent with Article 2.4—an issue that we examine below[153]—then USDOC's likelihood determination could not constitute a proper foundation for the continuation of anti-dumping duties under Article 11.3. Moreover, a legal defect of this kind cannot be cured by NSC's failure to take issue with it in the CRS sunset review or the administrative reviews. It follows that we cannot agree with the United States' suggestion that Japan's appeal on this issue must fail because: (i) NSC did not object, in either the CRS sunset review or the administrative reviews, to the methodology USDOC used to calculate the dumping margins in question; and (ii) Japan did not initiate dispute settlement proceedings in the WTO regarding USDOC's calculation of those margins in the context of the administrative reviews.[154]

131. We note that the Panel's reasoning would effectively preclude Japan from successfully challenging in the present WTO dispute settlement proceedings USDOC's use, in the CRS sunset review, of the dumping margins from the administrative reviews, simply because NSC did not raise this issue in the CRS sunset review. We cannot agree with this reasoning. We recall our previous finding that:

> In arguing claims in dispute settlement, a *WTO Member* is not confined merely to rehearsing arguments that were made to the competent authorities by the *interested parties* during the domestic investigation, even if the WTO Member was itself an interested party in that investigation.[155] (original emphasis)

---

Results", p. 6. (Exhibit JPN-8(e) submitted by Japan to the Panel) See also Panel Report, paras. 7.150 and 7.155.

[153] *Infra*, paras. 133-138.

[154] United States's appellee's submission, para. 40 and footnote 57 thereto, as explained further at the oral hearing.

[155] Appellate Body Report, *US – Lamb*, para. 113. See also Appellate Body Report, *Thailand – H-Beams*, para. 94.

132. For these reasons, we also reverse the Panel's finding, in paragraph 8.1(d)(iii) of the Panel Report, that the United States did not act inconsistently with Article 11.3 of the *Anti-Dumping Agreement* in the CRS sunset review by relying on dumping margins calculated in previous administrative reviews allegedly using a "zeroing" methodology.[156]

* * * *

[156] See also Panel Report, para. 7.184.

(4)

Supreme Court, U.S.
FILED
SEP 30 2004
OFFICE OF THE CLERK

No. 04-87

IN THE

# Supreme Court of the United States

KOYO SEIKO CO., LTD., *et al.*,
*Petitioners*,

v.

UNITED STATES OF AMERICA,
*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit**

## BRIEF AMICUS CURIAE FOR THE GOVERNMENT OF JAPAN IN SUPPORT OF PETITIONERS

MARK S. MCCONNELL
H. DEEN KAPLAN
LORANE F. HEBERT*
JONATHAN T. STOEL
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-6536

*Counsel of Record

*Counsel for Amicus Curiae*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

## TABLE OF CONTENTS


| | Page |
|---|---|
| TABLE OF AUTHORITIES | ii |
| STATEMENT OF INTEREST OF AMICUS CURIAE | 1 |
| STATEMENT OF THE CASE | 4 |
| SUMMARY OF ARGUMENT | 8 |
| REASONS FOR GRANTING THE WRIT | 9 |
| I. THE DECISION BELOW UPHOLDS AN INTERPRETATION OF A FEDERAL STATUTE THAT PLACES THE UNITED STATES IN VIOLATION OF ITS INTERNATIONAL OBLIGATIONS | 9 |
| II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENTS ON THE APPLICATION OF THE *CHARMING BETSY* DOCTRINE | 13 |
| CONCLUSION | 16 |

## TABLE OF AUTHORITIES

Page

*CASES*:

*Benz* v. *Compania Naviera Hildalgo, S.A.*, 353 U.S. 138 (1957) ..... 14

*McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963) ..... 13, 14

*Murray* v. *Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804) ..... 3, 9, 13

*Vimar Seguros y Reaseguros, S.A.* v. *M/V Sky Reefer*, 515 U.S. 528 (1995) ..... 16

*Weinberger* v. *Rossi*, 456 U.S. 25 (1982) ..... 14

*STATUTES*:

19 U.S.C. §§ 1673 *et seq.* ..... 1

19 U.S.C. § 1673 ..... 2

19 U.S.C. § 1677(35)(A) ..... 2

19 U.S.C. § 1677(35)(B) ..... 2

19 U.S.C. § 1677b(a) ..... 6, 12

Uruguay Round Agreements Act, 19 U.S.C. §§ 3501 *et seq* ..... 5

19 U.S.C. § 3511 ..... 5

*RULE*:

Sup. Ct. R. 10(c) ..... 13

**TABLE OF AUTHORITIES—Continued**

Page

*LEGISLATIVE MATERIALS*:

H.R. Doc. No. 103-316 (1994) ..... 6

S. Rep. No. 103-412 (1994) ..... 6

*TREATIES*:

Agreement Establishing the World Trade Organization, 1867 U.N.T.S. 154 (Apr. 15, 1994) ..... 4, 12, 15

Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, 1868 U.N.T.S. 201 (Apr. 15, 1994) ..... *passim*

General Agreement on Tariffs and Trade 1994, 1867 U.N.T.S. 187 (Apr. 15, 1994) ..... 4, 9

Understanding on Rules and Procedures Governing the Settlement of Disputes, 1869 U.N.T.S. 401 (Apr. 15, 1994) ..... 5

*OTHER AUTHORITIES*:

Report of the Appellate Body, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R (Mar. 1, 2001) ..... 7, 9, 11

Report of the Appellate Body, *United States – Final Dumping Determination on Soft-wood Lumber from Canada*, WT/DS264/AB/R (Aug. 11, 2004) ..... *passim*

**TABLE OF AUTHORITIES—Continued**

Page

*OTHER AUTHORITIES*:

Report of the Appellate Body, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R (Dec. 15, 2003) ..... 11, 15

Report of the Panel, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/R (Apr. 13, 2004) ..... 8

IN THE

# Supreme Court of the United States

No. 04-87

KOYO SEIKO CO., LTD., *et al.*,

*Petitioners*,

v.

UNITED STATES OF AMERICA,

*Respondent*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit**

## BRIEF AMICUS CURIAE FOR THE GOVERNMENT OF JAPAN IN SUPPORT OF PETITIONERS

## STATEMENT OF INTEREST OF AMICUS CURIAE

This case involves a dispute over a controversial practice known as "zeroing."[1] The Tariff Act of 1930 ("Tariff Act"), 19 U.S.C. §§ 1673 *et seq.*, provides for the imposition of

[1] Pursuant to this Court's Rule 37.6, Japan notes that no part of this brief was authored by counsel for any party, and no person or entity other than Japan made any monetary contribution to the preparation or submission of the brief. This brief is filed with the written consent of all parties pursuant to Rule 37.3(a). Copies of the requisite consent letters have been filed with the Clerk.

duties on foreign goods that have been "dumped" in the United States—*i.e.*, those that have been sold in the United States "at less than [their] fair value" and which have caused or threaten to cause "material injury" to a United States industry. *Id.* § 1673. In assessing antidumping duties, the United States Department of Commerce ("Commerce") calculates a "dumping margin"—*i.e.*, "the amount by which the normal value [of the subject merchandise] exceeds the export price or constructed export price of the subject merchandise." *Id.* § 1677(35)(A). Commerce then calculates a "weighted-average dumping margin" for the merchandise "by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer." *Id.* § 1677(35)(B). In calculating a weighted-average dumping margin, Commerce treats all "negative" dumping margins (those where "fair value" is less than the export price or constructed export price) as "zero." This practice is known as "zeroing."

The Government of Japan has a direct and substantial interest in this case. Commerce's use of "zeroing" has resulted in the imposition of increased antidumping duties against petitioners Koyo Seiko Co., Ltd., a Japanese manufacturer of automobile parts, including tapered roller bearings, and Koyo Corporation of U.S.A., its wholly-owned U.S. subsidiary (collectively, "Koyo"). Several similar cases involving Japanese bearing manufacturers are currently pending in U.S. courts. Japan estimates that the combined amount of increased antidumping duties resulting from Commerce's practice of "zeroing" in each of these cases is nearly $14 million. That figure will only continue to increase so long as Commerce continues to treat negative dumping margins as "zero."

But the excessive antidumping duty liability facing these Japanese companies is not the only matter that concerns Japan. The World Trade Organization ("WTO"), of which

both the United States and Japan are Members, has repeatedly held that the practice of zeroing violates the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement")—an international agreement to which the United States is bound—which requires "*a fair comparison* * * * between the export price and the normal value" of a foreign product. Anti-Dumping Agreement art. 2.4 (emphasis added). Indeed, just recently, the WTO reaffirmed its determination that zeroing violates the Anti-Dumping Agreement in a proceeding brought by Canada against the United States. *See* Report of the Appellate Body, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R (Aug. 11, 2004) ("*US – Softwood Lumber*"). As the WTO explained: "Zeroing means, in effect, that at least in the case of some export transactions, the export prices are treated as if they were less than what they actually are. * * * Zeroing thus inflates the margin of dumping for the product as a whole." *US – Softwood Lumber* ¶ 101 (emphases omitted).

Japan is thus deeply concerned that the excessive anti-dumping duty liability facing Koyo and other Japanese manufacturers is based on a practice that has been found to violate an international agreement that is binding on the United States. Moreover, in reviewing that practice, the Federal Circuit below refused to interpret the Tariff Act so as to avoid a violation of international law. In so doing, the court disregarded the venerable principle of statutory construction that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray* v. *Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.).

The Federal Circuit's failure to apply that principle could have serious repercussions for U.S. trade relations with Japan and other countries. When the WTO determines that a Member has violated the Anti-Dumping Agreement, ag-

grieved Members may be authorized to take lawful countermeasures against the non-complying Member that could significantly impair the non-complying Member's trade interests. If the United States' practice of zeroing is maintained, WTO Members aggrieved by that practice may have no choice but to initiate their own WTO proceedings against the United States and to eventually seek authorization to impose countermeasures against the United States, which could include the imposition of additional duties or tariffs on U.S. exports. This Court can, and should, avoid such consequences by granting certiorari and interpreting the Tariff Act in a manner consistent with the United States' international obligations, just as Congress intended.

## STATEMENT OF THE CASE

**The WTO and the Anti-Dumping Agreement.** Today, 147 countries, including Japan and the United States, are Members of the WTO, an international organization providing the common institutional framework for the conduct of trade relations among its Members. The WTO was established in 1995 pursuant to the Agreement Establishing the World Trade Organization ("WTO Agreement"), which incorporates a number of ancillary agreements, including the General Agreement on Tariffs and Trade 1994 ("GATT 1994") and the Anti-Dumping Agreement. Like all other WTO Members, the United States has agreed to "ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided" in the WTO Agreement. *Id.* art. XVI (4). *See also id.* art. II (2) ("The agreements and associated legal instruments included in Annexes 1, 2, and 3 * * * are * * * binding on all Members.").

One of the most notable features of the WTO is its binding dispute settlement process. Disputes arising under the WTO Agreement are settled by the WTO's Dispute Settlement Body ("DSB"), which is comprised of all WTO Members. If consultation with a Member believed to be in violation of the

WTO Agreement proves fruitless, an aggrieved Member can request the DSB to establish a dispute settlement panel. *See* Understanding on Rules and Procedures Governing the Settlement of Disputes arts. 4, 6 (WTO Agreement, Annex 2). Appeals from panel decisions are heard by the Appellate Body. *Id.* art. 17. If the Appellate Body finds that an action or policy is in violation of the WTO Agreement, it will recommend that the non-complying Member bring the measure into conformity with the Agreement. *Id.* art. 19(1). Absent consensus to the contrary, the Appellate Body's decision, together with the panel's decision as modified by the Appellate Body, shall be adopted by the DSB and "unconditionally accepted by the parties to the dispute." *Id.* art. 17(14).

If the non-complying Member fails to abide by the DSB's ruling, the aggrieved Member may eventually seek authorization from the DSB "to suspend the application to the Member concerned of concessions or other obligations" under the WTO Agreement—*i.e.*, take countermeasures against the non-complying Member. *Id.* art. 22(2). These lawful countermeasures can include, for example, raising tariffs on the non-complying Member's exports beyond those agreed to by the aggrieved Member under the WTO Agreement. Unless the DSB decides "by consensus" to reject the request, the DSB must authorize countermeasures to the extent of the "nullification or impairment" of benefits accruing to the aggrieved Member under the WTO Agreement—that is, to the extent that the aggrieved Member's rights under the WTO Agreement have been injured by the non-complying Member's violation. *Id.* art. 22(4), (6).

In 1994, Congress approved the WTO Agreement by passing the Uruguay Round Agreements Act ("URAA"), 19 U.S.C. §§ 3501 *et seq.* *See* 19 U.S.C. § 3511. Among other things, the URAA amends the Tariff Act to provide that, "[i]n determining * * * whether subject merchandise is being, or is likely to be, sold at less than fair value, *a fair compari-*

*son shall be made between the export price or constructed export price and normal value.*" 19 U.S.C. § 1677b(a) (emphasis added). That language tracks nearly verbatim Article 2.4 of the Anti-Dumping Agreement, which provides that "*[a] fair comparison shall be made between the export price and the normal value.*" Anti-Dumping Agreement art. 2.4 (emphasis added) (Pet. App. 126a).

In a Statement of Administrative Action ("SAA") issued in conjunction with the enactment of the URAA, Congress and the Executive Branch expressly confirmed that the URAA is "intended to bring U.S. law fully into compliance with U.S. obligations under [the Uruguay Round] agreements." *See* H.R. Doc. No. 103-316, Vol. I, at 669 (Pet. App. 130a). In particular, the SAA expressly makes clear that "[t]he requirement of Article 2.4 of the [Anti-Dumping] Agreement that a fair comparison be made between the export price or constructed export price and normal value is stated and implemented by section [1677b]." *Id.* at 820 (Pet. App. 131a). *See also* S. Rep. No. 103-412, at 67 (1994) ("[a]mended section [1677b(a)] incorporates the requirement of Article 2.4 of the Antidumping Agreement that a fair comparison be made between the export price or constructed export price and the normal value").

**Proceedings Below.** This case arises from Commerce's administrative review of tapered roller bearings imported from Japan for the period October 1, 1998 to September 30, 1999. During that period, prices for many of Koyo's entries were in fact *higher* than normal value, thus generating negative dumping margins. In calculating a weighted average dumping margin for Koyo's entries, however, Commerce treated all negative dumping margins as "zero." That practice resulted in weighted average dumping margins of 14.86% and 17.94% for the two categories of tapered roller bearings at issue here. Had Commerce *not* "zeroed" Koyo's negative dumping margins, however, Koyo's weighted average dumping margins would have been 0%

percent and less than 5%, respectively. Thus, by using a zeroing methodology in this case, Commerce not only substantially inflated Koyo's antidumping liability, but created antidumping liability where none would otherwise have existed.

The Court of International Trade upheld Commerce's determination of Koyo's dumping margins, and the Federal Circuit affirmed. *See* Pet. App. 1a, 19a. The Federal Circuit concluded that the Tariff Act "does not plainly require consideration of only those dumping margins with a positive value." Pet. App. 9a. Thus, the court acknowledged that the statute could be interpreted to permit the calculation of negative dumping margins in the determination of a weighted average dumping margin. The court accordingly considered whether to apply the *Charming Betsy* doctrine, "according to which courts should interpret U.S. law, whenever possible, in a manner consistent with U.S. international obligations." Pet. App. 12a. As Koyo had explained, the WTO Appellate Body had recently concluded that the practice of zeroing violates the Anti-Dumping Agreement. *See* Report of the Appellate Body, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R (Mar. 1, 2001) (adopted Mar. 12, 2001) ("*EC – Bed Linen*").

The Federal Circuit refused to apply *Charming Betsy*, noting that "the [WTO] decision is not binding on the United States, much less this court." Pet. App. 14a. The court also refused to apply *Charming Betsy* because *EC – Bed Linen* "did not involve the United States." *Id.* Indeed, the court concluded that "the absence of the United States as a party" was "an important distinction." *Id.* In addition, the court observed that *EC – Bed Linen* "dealt with an antidumping investigation as opposed to an administrative review of dumping." *Id.* Although Koyo had explained that the distinction was irrelevant, the court stated simply that it "disagree[d]." *Id.*

In its petition for rehearing, Koyo advised the court of an impending WTO panel report—to be issued in a proceeding "involv[ing] the United States"—which specifically concluded that the *United States*' practice of zeroing violates the Anti-Dumping Agreement. The Federal Circuit denied the petition. Pet. App. 50a. On April 13, 2004, the WTO panel issued its decision. *See* Report of the Panel, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/R (Apr. 13, 2004). Subsequently, the Federal Circuit granted Koyo's motion for a recall and stay of the mandate pending Koyo's filing of a petition for certiorari and this Court's final disposition of this case. Pet. App. 52a. On August 11, 2004, the WTO Appellate Body upheld the panel decision concluding that the United States' practice of zeroing violates the WTO Antidumping Agreement. *See US – Softwood Lumber*, *supra*. On August 31, 2004, the DSB adopted the Appellate Body's decision, together with the panel's decision as modified by the Appellate Body.

## SUMMARY OF ARGUMENT

The practice of zeroing violates the Anti-Dumping Agreement. As the WTO Appellate Body has explained, "dumping" within the meaning of that Agreement can be found to exist "only for the product under investigation *as a whole*." *US – Softwood Lumber* ¶ 93 (emphasis added). Because zeroing fails to account for *negative* as well as *positive* antidumping margins, zeroing "means, in effect, that at least in the case of some export transactions, the export prices are treated as if they were less than what they actually are." *Id.* ¶ 101 (emphases omitted). Article 2.4 of the Anti-Dumping Agreement, however, requires "a fair comparison * * * between the export price and the normal value" of a product. As the Appellate Body has held, "a comparison between export price and normal value that does *not* take fully into account the prices of *all* comparable export transactions—such as the practice of 'zeroing' * * * is *not* a "fair compari-

son" between export price and normal value, as required by Article 2.4." *EC – Bed Linen* ¶ 55 (Pet. App. 112a).

By engaging in the practice of zeroing—which the Federal Circuit upheld in this case—the United States is violating its international obligations under the Anti-Dumping Agreement. That alone provides a compelling basis for certiorari. The need for review is underscored, moreover, by the Federal Circuit's refusal to construe the Tariff Act so as to *avoid* a violation of international law. For two hundred years, this Court has consistently honored the principle that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Charming Betsy*, 6 U.S. (2 Cranch) at 118. The Federal Circuit's failure to heed that admonition here conflicts with this Court's precedents. That conflict is particularly intolerable because it poses a serious threat to U.S. trade interests. If the United States' practice of zeroing is maintained, WTO Members aggrieved by that practice may have no choice but initiate their own WTO actions and to eventually seek authorization to impose countermeasures against the United States that could have a substantial impact on U.S. trade.

## REASONS FOR GRANTING THE WRIT

### I. THE DECISION BELOW UPHOLDS AN INTERPRETATION OF A FEDERAL STATUTE THAT PLACES THE UNITED STATES IN VIOLATION OF ITS INTERNATIONAL OBLIGATIONS.

As the WTO Appellate Body—the entity specifically charged with interpreting the WTO Agreement, which includes the Anti-Dumping Agreement—has repeatedly held, the practice of zeroing is inconsistent with, and thus violates, the Anti-Dumping Agreement. Article VI:1 of the GATT 1994 defines "dumping" as that "by which *products* of one country are introduced into the commerce of another country at less than the normal value of the *products*." GATT 1994 art. VI:1 (emphasis added). Similarly, Article 2.1 of the

Anti-Dumping Agreement—which implements Article VI of the GATT 1994—provides that "a *product* is to be considered as being dumped, i.e., introduced into the commerce of another country at less than its normal value, if the export price of the *product* exported from one country to another is less than the comparable price * * * for the like *product* when destined for consumption in the exporting country." Anti-Dumping Agreement art. 2.1 (Pet. App. 126a) (emphasis added).

Thus, as the WTO Appellate Body explained in *US – Softwood Lumber*, "dumping," within the meaning of the Anti-Dumping Agreement, "can therefore be found to exist only for the product under investigation *as a whole*," as opposed to individual sales, models, or categories of products. *US – Softwood Lumber* ¶ 93 (emphasis added). Likewise, the term "margins of dumping," as used in the Anti-Dumping Agreement, "can be found only for the product under investigation *as a whole*." *Id.* ¶ 96 (emphasis added).

As discussed, Article 2.4 of the Anti-Dumping Agreement requires "a fair comparison * * * between the export price and the normal value" of a product. In failing to account for *negative* margins as well as *positive* margins, the practice of zeroing does not result in a "fair comparison" between the export price and the normal value of the product *as a whole*. As the Appellate Body explained in *US – Softwood Lumber*:

> Zeroing means, in effect, that at least in the case of some export transactions, the export prices are treated as if they were less than what they actually are. Zeroing, therefore, does not take into account the entirety of the prices of some export transactions * * *. Zeroing thus inflates the margin of dumping for the product as a whole." [*US – Softwood Lumber* ¶ 101 (emphases omitted).]

This has been the WTO's consistently held view. In *EC – Bed Linen*, the Appellate Body explained that:

> a comparison between export price and normal value that does *not* take fully into account the prices of *all* comparable export transactions—such as the practice of "zeroing" at issue in this dispute—is *not* a "fair comparison" between export price and normal value, as required by Article 2.4 and Article 2.4.2. [*EC – Bed Linen* ¶ 55 (Pet. App. 112a.]

Similarly, in *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan* ("*US – Corrosion-Resistant Steel*")—another proceeding involving the United States—the Appellate Body concluded that:

> [w]hen investigating authorities use a zeroing methodology such as that examined in *EC –Bed Linen* to calculate a dumping margin, *whether in an original investigation or otherwise*, that methodology will tend to inflate the margin calculated. Apart from inflating the margins, such a methodology could, in some instances, turn a negative margin of dumping into a positive margin of dumping * * *. Thus, the inherent bias in a zeroing methodology of this kind may distort not only the magnitude of a dumping margin, but also a finding of the very existence of dumping. [Report of the Appellate Body, WT/DS244/AB/R ¶ 135 (Dec. 15, 2003) (adopted Jan. 9, 2004) (Pet. App. 102a-103a) (emphasis added).[2]]

Thus, in *US – Softwood Lumber*, the WTO Appellate Body concluded that "the United States acted inconsistently with Article 2.4.2 of the *Anti-Dumping Agreement* in determining the existence of margins of dumping on the basis of a methodology incorporating the practice of 'zeroing.'" *US –*

---

[2] In *US – Corrosion-Resistant Steel*, the Appellate Body ultimately concluded that it could not resolve the dispute at issue because the panel had failed to make certain factual findings. Report of the Appellate Body ¶ 137 (Pet. App. 103a-104a).

*Softwood Lumber* ¶ 117. That conclusion applies with equal force in this and all other cases in which the United States uses zeroing in determining dumping margins. As a Member of the WTO, however, the United States expressly agreed to "ensure the conformity of its laws, regulations and *administrative procedures* with its obligations as provided" in the WTO Agreement. WTO Agreement art. XVI (4) (emphasis added). *See also* Anti-Dumping Agreement art. 18.4 ("Each Member shall take all necessary steps, of a general or particular character, to ensure, not later than the date of entry into force of the WTO Agreement for it, the conformity of its laws, regulations, and *administrative procedures* with the provision of this Agreement as they may apply for the Member in question.") (emphasis added). Indeed, Congress went so far as to amend the Tariff Act to incorporate the Anti-Dumping Agreement's "fair comparison" requirement for the express purpose of "bring[ing] U.S. law fully into compliance with U.S. obligations under [the WTO Agreement]." Pet. App. 130a (SAA). *See* 19 U.S.C. § 1677b(a).

The Federal Circuit nevertheless upheld Commerce's practice of zeroing in this case, thus conferring upon Commerce the authority to place the United States in violation of its international obligations. That decision could have serious adverse consequences for U.S. trade interests. Under the WTO Agreement, a Member aggrieved by another Member's violation of the Agreement may be authorized to take countermeasures to the extent that benefits accruing to that Member have been "nullifi[ed] or impair[ed]." *See supra* at 5. If the United States' practice of zeroing is maintained, WTO Members aggrieved by that practice may have no choice but to initiate their own WTO actions and to eventually seek authorization to impose countermeasures against the United States, which could include additional duties or tariffs on U.S. exports. As the petition notes, the Congressional Budget Office estimates that the United States will collect about $2.35 billion antidumping and countervailing

duties in the years 2005-2009, and $3.85 billion in such duties in the years 2004-2014. Pet. 17-18. Thus, if allowed to stand, the decision below could potentially result in the imposition of substantial additional duties or tariffs on U.S. exports in the years ahead.

## II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENTS ON THE APPLICATION OF THE *CHARMING BETSY* DOCTRINE.

The fact that the decision below upholds an administrative practice that places the United States in violation of its international obligations alone provides a compelling basis for certiorari. In upholding that practice, however, the Federal Circuit refused to construe the Tariff Act so as to *avoid* a violation of international law. In that respect, the decision below cannot be reconciled with this Court's precedents on the application of the *Charming Betsy* doctrine. That conflict provides an additional basis for this Court's review. *See* S. Ct. R. 10(c).

Since Chief Justice John Marshall famously declared on behalf of this Court some two hundred years ago that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains," *Charming Betsy*, 6 U.S. (2 Cranch) at 118, this Court has consistently applied that teaching to avoid potential conflicts between domestic and international law. In *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963), for example, the Court considered whether the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.*, applied to American-owned ships sailing under foreign flags. Invoking *Charming Betsy*, the Court refused to construe the Act to apply to foreign-flag vessels where such application would be contrary to a "well-established rule of international law." *Id.* at 21. The Court was particularly concerned that the application of the Act to such vessels could lead to

"international discord" and "invite retaliatory action from other nations." *Id.* Thus, in the absence of clear congressional intent, the Court preferred to tread carefully in this " 'delicate field of international relations.' " *Id.* (quoting *Benz* v. *Compania Naviera Hildalgo*, 353 U.S. 138, 147 (1957)).

Likewise, in *Weinberger* v. *Rossi*, 456 U.S. 25 (1982), the Court considered whether the term "treaty" in a statute prohibiting employment discrimination against U.S. citizens on U.S. military bases overseas included executive agreements as well as Article II, Senate-ratified, treaties. *See* Pub. L. 92-129, § 106, 85 Stat. 355 (1971). As the Court observed, an interpretation that limited the term "treaty" to Article II treaties would have effectively "repudiate[d]" executive agreements in force at the time the statute was enacted. *Weinberger*, 456 U.S. at 31. Applying *Charming Betsy*, the Court concluded that "some affirmative expression of congressional intent to abrogate the United States' international obligations [would be] required in order to construe the word 'treaty' * * * as meaning only Art. II treaties." *Id.* at 32. Because such "affirmative expression" was lacking, the court refused to read the statute to "abrogate the United States' international obligations."

There was no reason for the Federal Circuit to depart from those settled precedents here. As the court concluded, the Tariff Act "does not plainly require consideration of only those dumping margins with a positive value." Pet. App. 9a. Thus, the court was left to choose between two competing interpretations of the Act: one that would effectively "repudiate" an executive agreement and "invite retaliatory action from other nations," and one that would give effect to the United States' international obligations and avoid "international discord." Contrary to this Court's precedents—and the judgment of the WTO—the court chose the former interpretation. Although that interpretation happened to be Commerce's, an agency's interpretation that violates international

law is simply not reasonable, and thus should not be entitled to deference. *See* Pet. 18-19.

At bottom, the court refused to apply *Charming Betsy* because, in its view, it was not clear that Commerce's use of zeroing in this case violated the Anti-Dumping Agreement. Thus, the Federal Circuit purported to distinguish *EC – Bed Linen* on the ground that "it dealt with an antidumping investigation as opposed to an administrative review of dumping." Pet. App. 14a. But that is a distinction without a difference. As the Appellate Body has emphasized: "[w]hen investigating authorities use a zeroing methodology such as that examined in *EC – Bed Linen* to calculate a dumping margin, *whether in an original investigation or otherwise*, that methodology will tend to inflate the margin calculated * * * [and], in some instances, turn a negative margin of dumping into a positive margin of dumping." *US – Corrosion-Resistant Steel* ¶ 135 (emphasis added) (Pet. App. 102a).[3]

---

[3] The Federal Circuit apparently assumed that Article 2 of the Anti-Dumping Agreement applies only to the determination of dumping margins during an investigation. *See* Pet. App. 14a-15a. To the contrary, Article 2 of the Agreement broadly governs the "Determination of Dumping"—"whether in an original investigation or otherwise." *US – Corrosion-Resistant Steel* ¶ 135 (Pet. App. 102a). *See* Anti-Dumping Agreement art. 2 (Pet. App. 126a). Article 5 governs the "Initiation and Subsequent Investigation," whereas Article 9 governs the "Imposition and Collection of Anti-Dumping Duties"—including the imposition of retrospective antidumping duties during an administrative review. *Id.* arts. 5, 9. That Article 2 of the Agreement broadly governs the "Determination of Dumping"—in both investigations *and* administrative reviews—is made clear by Article 9.3, which provides that "[t]he amount of the anti-dumping duty shall not exceed the margin of dumping *as established under Article 2*." Anti-Dumping Agreement art. 9.3 (emphasis added).

The court also purported to distinguish *EC – Bed Linen* on the ground that "it did not involve the United States." Pet. App. 14a. Indeed, the court emphasized that "the absence of the United States as a party" was an "important distinction." *Id.* Since then, of course, the WTO Appellate Body has specifically concluded—in a proceeding that directly examined the zeroing practice of the United States—that the United States' zeroing practice violates the Anti-Dumping Agreement as well. There is thus no longer any question that, by using zeroing in calculating dumping margins, the United States is violating its international obligations. In upholding Commerce's interpretation of the Tariff Act here, the Federal Circuit has sanctioned that result. As this Court has admonished, however, "[i]f the United States is to be able to gain the benefits of international accords and have a role as a trusted partner in multilateral endeavors, its courts should be most cautious before interpreting its domestic legislation in such manner as to violate international agreements." *Vimar Seguros y Reaseguros, S.A.* v. *M/V Sky Reefer*, 515 U.S. 528, 539 (1995). The Federal Circuit's failure to heed that admonition in this case fully warrants this Court's review.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted, and the judgment below reversed.

Respectfully submitted,

MARK S. MCCONNELL
H. DEEN KAPLAN
LORANE F. HEBERT*
JONATHAN T. STOEL
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-6536

*Counsel of Record

*Counsel for Amicus Curiae*

MOTION FILED
OCT 2 1 2004

(6)

No. 04-87

IN THE
# Supreme Court of the United States

KOYO SEIKO CO., LTD., *et al.*,
*Petitioners*,

v.

UNITED STATES OF AMERICA,
*Respondent*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit**

## MOTION OF THE GOVERNMENT OF JAPAN FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS

MARK S. MCCONNELL
H. DEEN KAPLAN
LORANE F. HEBERT*
JONATHAN T. STOEL
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-6536

*Counsel of Record

*Counsel for Amicus Curiae*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

Pursuant to S. Ct. R. 37.2(b), the Government of Japan hereby files this motion for leave to file a brief amicus curiae in support of petitioners. The parties to the proceeding that are listed in the S. Ct. R. 14(b) statement of the petition for a writ of certiorari—petitioners Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A., and respondent the United States of America—consented to the filing of Japan's brief. The Timken Company is not listed as a party to the proceeding in the petition or named in the caption of the petition, but was a party to the proceedings below. After the filing of Japan's brief, Timken informed Japan that it does not consent to the filing of Japan's brief. In response, Japan promptly filed this motion for leave to file its brief.

As set out in the Statement of Interest in Japan's brief, Japan has a direct and substantial interest in this case. The Department of Commerce's use of "zeroing" has resulted in the imposition of increased antidumping duties against petitioners Koyo Seiko Co., Ltd., a Japanese manufacturer of automobile parts, including tapered roller bearings, and Koyo Corporation of U.S.A., its wholly-owned U.S. subsidiary. Several similar cases involving Japanese bearing manufacturers are currently pending in U.S. courts. Japan estimates that the combined amount of increased antidumping duties resulting from Commerce's practice of "zeroing" in each of these cases is nearly $14 million. That figure will only continue to increase so long as Commerce continues to treat negative dumping margins as "zero."

But the excessive antidumping duty liability facing these Japanese companies is not the only matter that concerns Japan. The World Trade Organization ("WTO"), of which both the United States and Japan are Members, has repeatedly held that the practice of zeroing violates the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement")—an international agreement to which the United States is

bound. Indeed, just recently, the WTO reaffirmed its determination that zeroing violates the Anti-Dumping Agreement in a proceeding brought by Canada against the United States. *See* Report of the Appellate Body, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R (Aug. 11, 2004) ("*US – Softwood Lumber*"). Japan is thus deeply concerned that the excessive antidumping duty liability facing Koyo and other Japanese manufacturers is based on a practice that has been found to violate an international agreement that is binding on the United States. Moreover, in reviewing that practice, the Federal Circuit below refused to interpret the Tariff Act so as to avoid a violation of international law.

The Government of Japan believes that its views would be of material assistance to the Court in considering whether to grant certiorari in this case, and thus respectfully requests that the Court grant this motion and consider the matters raised in its brief amicus curiae.

Respectfully submitted,

MARK S. MCCONNELL
H. DEEN KAPLAN
LORANE F. HEBERT*
JONATHAN T. STOEL
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-6536

*Counsel of Record

*Counsel for Amicus Curiae*